Supreme Court, U.S.
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No. 95-5207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

JOINT APPENDIX

ROBERT A. RAVITZ *
JULIA C. SUMMERS
KIM CHANDLER JOHNSON
Office of the Oklahoma County Public Defender
320 Robert S. Kerr, Rm 611
Oklahoma City, OK 73102
(405) 278-1550
Counsel for Petitioner

* Counsel of Record

W. A. DREW EDMONDSON
SANDRA D. HOWARD *
Office of the Attorney General for the State of Oklahoma
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921
Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 13, 1995
CERTIORARI GRANTED OCTOBER 5, 1995

103PP

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RELEVANT DOCKET ENTRIES

DATE	ENTRY
August 8, 1990	Defense counsel filed Application for Determination of Competency. Judge Eugene Mathews entered Order directing Department of Mental Health to examine Petitioner at the Oklahoma County Jail and make determinations as to the statutorily required questions.
August 27, 1990	Post-Examination Competency Hearing held before Judge Bana Blasdel; upon finding of incompetency, Petitioner was committed to Eastern State Hospital for further evaluation and treatment.
December 20, 1990 and January 18, 1991	Upon Petitioner's return from Eastern State Hospital, a second post-examination competency hearing was held before Judge Richard Freeman. Finding Petitioner competent, Judge Freeman entered Order to Resume Criminal Proceedings.
May 4-5, 1992	On the day trial was to begin, another competency hearing was held, at the conclusion of which District Judge Richard Freeman determined Petitioner to be competent to stand trial under Oklahoma's standard of "clear and convincing."
May 5-22, 1992	Petitioner was tried for and convicted of Murder in the First Degree for the murder of Harold Sheppard. Following the penalty phase the jury assessed death.

DATE	ENTRY
June 5, 1992	At formal sentencing, Petitioner's lead attorney objected to proceeding on the ground that Petitioner was incompetent. Court overruled the objection and sentenced Petitioner to die by lethal injection.
January 10, 1995	Court of Criminal Appeals of Oklahoma affirmed conviction and sentence.
February 13, 1995	Court of Criminal Appeals of Oklahoma denied petition for rehearing and directed issuance of mandate.

DISTRICT COURT OF OKLAHOMA COUNTY

No. CF-89-5084

THE STATE OF OKLAHOMA

vs.

BYRON KEITH COOPER

TRANSCRIPT OF PROCEEDINGS
MOTION HEARINGS HAD ON APRIL 29, 1992

Before the HONORABLE RICHARD W. FREEMAN,
District Judge.

[207] MR. MILDFELT: * * * I have one last issue that I need to make a record on if I'm not cutting anybody off.

THE COURT: All right.

MR. MILDFELT: Mr. Cooper, today, and I need to make a record on this. I think he's faking, I don't know how the Court feels, but this week or last week he lunged at or swung or appeared like he was going to hit Mr. Ravitz and Mr. Bush got between them. Because I didn't come over there. Mr. Ravitz is my co-counsel and he and I were not communicating. The last time we communicated we were hollering at one another through the bars up in the jail.

Today, at one point when I got too close to him, he grabbed a chair and told the deputies to keep me away from him. He has hollered in here so loud at times that the court reporter couldn't hear what was going on [208] and I was screaming at the top of my lungs. I think he

has cried, too. I have tried not to watch him or zero in on that because I could hear him.

This afternoon or at least what parts that I have seen him, and this may not be accurate all afternoon, that he has sat there with his head down. Now, he may have looked around some, but most of the times that I have looked at him his head is looking down.

I raise all of this because in my opinion he is faking, but I am not a doctor. I have two of my investigators that think he's cracking up. I think he's faking. This is a capital murder case, death penalty. If Mr. Miller wishes to name somebody, pick a psychiatrist of his choice, we will pay for it, have him examined tomorrow, just to see, you know, what assessment is correct, because I'm not a doctor and I get into these cases and I'm ready for trial and I say I'm ready for trial and I say he's faking. But I'm not a doctor and so I want to be fair, so I'm not picking a hired gun.

THE COURT: Are you raising insanity?

MR. MILDFELT: Not as a defense to the crime but incompetence, I have to do that, because the Court's seen him and seen him act today and we've got a week or two weeks of trial coming up and I perceive a very difficult situation. He is not communicating with me, [209] he's not happy with me. I don't know where he's going to sit in the courtroom. I don't know whether he's going to allow himself to be dressed out. I don't know whether he's incompetent or whether he's faking.

And, yes, I'm raising that issue and I just allow it to the Court, let the D.A. pick whomever they want to go look at him and we'll pay for it. We've got a court fund with 40 big ones in it and we'll pay for it but I think we ought to assure ourselves of that before we proceed out.

THE COURT: Well, are you telling me that you're unable to defend him or what are you saying to me now? You know, he's been adjudicated competent.

MR. MILDFELT: Competent before this Court.

THE COURT: And I will say after viewing the tape of his interview he's quite an intelligent person. He has a good command of language. There's not the slightest indication to me on that tape that he isn't very sound. He's a sharp individual.

Now, I understand people can come and go and I understand he's been in jail for quite a while. This case has lain dormant for some time because of the inability of the defense to get funds, I understand, but I don't know that that has been a hindrance to the preparation of the case because really, I don't know what [210] you have in the way of evidence, if any, that you intend to offer.

But the big burden appears to me to be on the State rather than the defense, but I do know you need the cooperation of your client to a defendant. So, what are you really talking about?

MR. MILDFELT: Well, Judge, I just want to make sure that the record is clear. He and I are not communicating, that's obvious.

THE COURT: I've seen the letters.

MR. MILDFELT: He's accused me of trying to kill him with a nylon rope. He says I hit him.

Now, I bond with my clients and it is not above me to kind of punch them on the shoulder in a fatherly sort of way, not in a way of anger and I would never touch a client in anger unless a client grabbed me.

He and I did get in a hollering match the last time I talked to him. He refused to talk to me about this case at all, refuses to acknowledge that he has this case. Continues to talk about a rape case and a kidnapping case and that the girl won't show an that he's been screaming and hollering over here today, that see the girl, as if the girl had testified. And he cried I believe this afternoon or this morning.

THE COURT: Well, he's been adjudicated [211] competent and I've observed him on the tape to be competent and the fact that he may be putting on an act or not now, I'm not the least bit concerned about that, personally.

MR. MILDFELT: Well, I think it can raise it's ugly head at any time.

THE COURT: It can. And if he creates a disturbance during the trial I think, if he is faking and if he does do that, that's going to go against him? The jury's not going—

MR. MILDFELT: But if he's not faking, Your Honor—

THE COURT: It's a travesty, perhaps. We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done.

MR. MILDFELT: All right, Your Honor, if that's the Court's ruling. I just wanted you to know that we would pay for it.

THE COURT: Do you want to have him examined?

MR. MILLER: No. Judge, but if he is incompetent today, if someone were to raise a question of his competency, I believe we'd have to have a hearing to decide if he is.

[212] THE COURT: I think so.

MR. MILLER: But Mr. Mildfelt has said three times the word faking and that's his opinion. No one else has raised the issue of his competency and for the record, I've seen the man two weeks in a row at formal arraignment and on another charge, possession of a weapon that he made in the jail charge that we prelimed. I prelimed the offense about three weeks ago. I went down to formally arraign him one day and then the Judge passed it on over to another day.

I observed him three times and when he's not talking about this case, he seems to be just fine. He may be belligerent, but he never acted like he didn't know what was going on around him. And for my perspective, I think I have the right or the duty to come forward if I thought he was incompetent.

THE COURT: You both have the duty if you think he's incompetent to come forward and—

MR. MILLER: And neither one of us do, Judge, so that's the test. If he's incompetent today or we have a question about it, we have to have him looked at, but I don't think he is, Mr. Mildfelt doesn't think he is. The Court already indicated he doesn't think—

MR. MILDFELT: Gentleman, I have two people in my office, investigators, that think he is. I don't [213] think he is and I only say that for the record because I'm going to be candid in front of the Court. I'm an officer of the Court. I don't think he is, but two of my investigators think he is. I'm not a doctor.

THE COURT: What you think counts in the court, of course. If you have any evidence you want to put on to that effect or if you want to have him examined yourself and you have the funds, while feel free to do so.

* * * *

DISTRICT COURT OF OKLAHOMA COUNTY

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS
PRE-TRIAL MOTIONS AND COMPETENCY HEARING
HAD ON MAY 4 AND 5, 1992

Before the HONORABLE RICHARD W. FREEMAN,
District Judge.

[99] Q (By prosecutor) Do you see him talking like he is right now off to nobody like he's talking about some rape charge or something?

A (By Charles Owen Smith) He stays in his room it seems like a lot, you know, talking to himself. . . .

* * * *

[102] Q (By defense counsel) And you have, if I understood correctly, seen him in his room talking to himself like he's doing sitting over in the corner today here in the courtroom?

A (By Charles Owen Smith) Yes, sir, I have.

* * * *

[106] Q (By defense counsel) Now, when you say he talks to himself, do you see him talking to himself over there now?

A (By Anthony Boult) Yes.

* * * *

[188] DR. PHILIP MURPHY

Called as a witness on behalf of the Defendant, after first being duly sworn, testified on his oath as follows; to wit:

DIRECT EXAMINATION

BY MR. MILDFELT:

Q Would you state your name for the Judge, please?
A Yes, Philip J. Murphy.
Q And what is your profession or occupation, please?
A I'm a licensed clinical psychologist.
Q Can you tell us about your educational background?
A Yes, I received a Bachelor's in psychology and biology from City College of New York in 1967, a Master's and Ph.D. in clinical and physiological psychology from the University of Maryland in 1972.

I was involved in a one-year internship at Creedmoor State Hospital from 1970 to '71, which is a state hospital in New York State and a one-year clerkship at the Washington Veterans Administration Hospital for 1971 to '72.

Q And when did you get your Doctorate?
A I passed my orals in '72, then I went on to be a [189] professor or an associate professor tenured at Oklahoma State University from 1972 to 1982.

Q What else have you done experience-wise that qualifies you to be a clinical psychologist?

A Part of the training has to do with receiving a Ph.D. in clinical psychology in a nationally-approved training program which the University of "O" was. The internship was also A.P.A. approved at Creedmoor State Hospital.

Upon completion of your dissertation and having all the court work and the clinical clerkships, then you receive your degree. Then I was licensed in the state of Oklahoma in 1975, and have been in continuous private practice since that time.

Q Have you been qualified to testify in courts in the state of Oklahoma before this day?
A Yes, I have.
Q Did your office contact you yesterday, doctor, to examine Byron Keith Cooper?
A Yes.

Q And did you perform an examination of him some time in the evening hours of May the 4th, last night?

A That's correct.

Q Prior to that examination, did you review any records from Eastern State Hospital?

[190] A Yes, I did.

Q And can you tell me what, if anything, those contributed to your examination, the records that you examined from Eastern State Hospital?

A Yes, they did. The records from Eastern State Hospital begin in August, I think August 28th of 1990. He had been sent to Eastern State for competency following Dr. Edith King's evaluation that he was not competent just prior to that in August of 1990, so they sent him up there for an evaluation.

When he first entered Eastern State, both Dr. Patterson and Dr. Lazarica (spelled phonetically), both found him to be severely ill, looking very schizophrenic, thought disorder, very psychotic. Inside of a month, by the end of September, and by the way, they placed him on Halidol at that time, which is an antipsychotic medication, which would fit that diagnosis.

However, by the end of the month of September, Dr. Lazarica was feeling that he wasn't seeing much schizophrenia in the man. What he was noticing more was other types of borderline problems, personnel disorder problems, sociopathic problems.

When you look then in the nursing record then in October, you come up with things like, and this is from the nurse, this is a world-class, first-class [191] manipulator, seems to want his way a little more and etcetera, etcetera.

They took him off Halidol at the latter part of September and the reason for that was that Dr. Lazarica felt that he really didn't see any dose response curve between the Halidol they were giving him and any benefit it was having on the patient.

They finally released him back to Oklahoma County in December, basically feeling he was competent at that time to stand trial. He had been on some antidepressants after he was on Halidol and the antidepressants were for a different problem.

They did a blood level on his antidepressants some time in November and found interestingly that one of his blood levels was lower than would be expected. My clinical interpretation of that was that in fact his system was clearly needing that type of medicine and in fact, was overutilizing it and that's why in fact one of the blood levels had come up low.

Q And they had taken him off of it?

A No, this was when he was on it. They have certain expectations with a given dose of what his blood level should be. And one of the particular metabolites of the antidepressant he was on, showed low.

What I'm saying is that clinically when I see that [192] it's almost diagnostic information. It's like that system really has an affinity for that drug and therefore it's utilizing it and coming up lower than expectation on the blood level.

Q Anything else you gathered from Eastern State records before you went to see him that you thought was significant at that time before you go see him?

A Well, yeah, there was on the diagnosis going in, he had part of the five axis diagnosis that's used today, in psychiatric diagnosis is a focal level of functioning. His focal level of functioning when he came in was rated at a 15. A 15 was based upon his being apparently mute, very noncommunicative.

That is interesting in that also a 15, which is an extremely low number saying the person's barely fuunctioning at all would be gotten from smearing feces. And I thought that that was interesting consistency given some of the evidence that had been spoken about yesterday.

Q Now, after you had all that information, did you go over and see him in County Jail?

A I did, last night.

Q And did you make an examination, however you do that and conduct some tests with him?

A I did.

[193] Q As a result of your examination and your tests with him, what did you determine?

A Well, it's complicated so I'll sort of list them.

First, some part of his behavior is due to malingering. He is attempting to look worse than he is.

Q Okay.

A Secondly, that I think that he's not schizophrenic but that he suffers from an affective, major affective disorder which would be on a separate branch of mental illness than schizophrenia, which is a thought disorder.

Q But it is a form of mental illness?

A Yes, it is and it is episodic, meaning that he is going to get bad and then all by itself, even without medication, come back up to levels of functioning he had before. I think that's what happened, in fact, back in August of 1990, when he first went to Eastern State.

I think he had an active exacerbation of that illness. That's what he looked like. He was probably psychotic at that time. That's what people were seeing and they were presuming that he was schizophrenic. When he remitted in about a month, that's where everybody was confused about what's going on with this guy. He's not responding perfectly to the medicine. So that's the second finding.

The third finding is that he, even when I was able [194] to get to the point of speaking quite coherently with him, his thought patterns were quite clear, showed no evidence of any structural problems in his thinking. Then he would sort of confuse, and I don't mean that necessarily in a conscious way. His time sense to me seems confused. It was hard for me to track anything with him in time.

So, the third finding has to do with his ability to help you as counsel and at this point in time, I don't think that he can do that effectively. In that sense, I don't judge him to be competent right now.

Q * * * There was some testimony yesterday, I don't know whether you were present when that was given, about a person called Noryb?

A Yes.

* * * *

Q Were you present when some of that came on?

A I saw the picture but I wasn't present when the more dramatic aspects occurred.

Q Did you discuss anything with him about Noryb?

A Oh, yes. Yes.

Q And what did you glean from that? What finding did you make from that?

A One, I think that Noryb is real. I mean, I do not [195] think that that is a part of his manipulation and his malingering. It is a complex inside his mind which probably, and I'm not going to be able to say one hundred percent, my belief is it's a combination of a step-father he had, who his mother had killed back when he was a young teenager or mid-teen. And I think, based on the information I have, that this man was probably the only positive father image that this man has experienced in his lifetime.

I think he represents, Noryb represents sort of a complex of God and father. He is very frightened of Noryb and yet he wants Noryb's protection. I think you personally represent Noryb in some degree to him and that's why he's afraid of you.

Q You believe he's honestly genuinely afraid of me?

A Yes, I do believe he is honestly afraid of you.

Q You don't think that's any part of any malingering whatsoever?

A No, that is not malingering.

Q Do you believe that in view of all of these facts that he can effectively communicate with me as his attorney?

A Not at this time.

Q Now, you talked about this disorder that he has. This is a recognized disorder?

[196] A Yes.

Q Is it treatable?

A Yes, it is.

Q How do you treat it?

A My suggestion would be to begin him on a regimen of Lithium and to see what effects that will have. I cannot say at this time whether he is manic depressive, which is one diagnosis on that affective disorder or whether he is major depression recurrent.

But along that line, Lithium would be the one medication that I think would have a clearer shot at helping him get clearer so that he could communicate effectively with you.

* * * *

Q Does the stress affect him?

A Yes, it does. The stress of going to court, of having these things come up is a problem. It probably adds to his decompensation and I think that that also is potentially treatable. And I think with minor anti-anxiety agents that that might be helpful in a sort of limited dose as he's preparing for these types of proceedings.

Q But the stress didn't cause the condition? It's a [197] mental condition that occurred before the stress, would that be fair?

A That's fair.

Q The stress just aggravates the condition?

A That is correct.

* * * *

CROSS EXAMINATION

[198] * * * Q (By Mr. Miller) Now, Doctor, you reviewed the records of Eastern State Hospital, right?

A That's correct.

Q And you reviewed the report, I'm sure, of Dr. King when she looked at him back in August of 90?

A Yes.

* * * *

[199] * * * Q And then you talked to the Defendant, right?

A Last night, that's right.

Q And what else did you do?

A Well, I was here yesterday afternoon observing him in the courtroom.

Q Okay. Anything else?

A That's probably the total amount of the data. I did also look at some records on his mother, some psychiatric records of his mother.

Q And you said that she was misdiagnosed as schizophrenic also?

A I believe that, yes. When I looked at those records I believe that probably the more proper diagnosis for her would have been very similar to him, meaning, more affective disorder.

Meaning, I believe that that would be more of an affective disorder.

* * * *

[200] * * * Q Who were the people testifying when you left?

A I don't recall. At the time the testimony was going on, I was reviewing notes, so I really wasn't tracking much who was up here testifying.

* * * *

Q Can you tell me what it was that you remember the witnesses saying that you heard that would affect your diagnosis?

A I don't think that there was anything that I heard from this seat that affected the diagnosis.

Q So the feces business, that has nothing to do with [201] it, right?

A The only consistency with the feces is one I mentioned that, I mean, I cannot say whether the feces is an effect of this man's disorder right now or whether that's part of the malingering.

* * * *

Q So, the bottom line, the things that all the prisoners—excuse me, the residents came in here and testified to of the County Jail, that wouldn't have any effect on you?

A No, meaning I could chalk that up to it being simply malingering. I could chalk it up to this is a partial decompensation to do with his getting ready for trial.

Q Partial? So at least part of it is malingering is what you're telling me?

A Yes, definitely.

Q Because the things that they were doing that they testified to that you heard of at least, a lot of those things weren't really consistent with the disorder that he has, is that true?

A Yeah, I think that's accurate.

Q Alright. Now, the testimony from some of the state's witnesses that same yesterday afternoon indicated that he acted rather normally.

[202] A Right, the guard who was on the previous pod.

Q That wouldn't be consistent, that kind of activity, normal conduct. That wouldn't be consistent with this disorder either, would it?

A The disorder that I'm talking about that he has?

Q Yes, sir.

A Yes, meaning it would be consistent because it's episodic meaning, what happens is the person goes through a period of time when he is ill, and then all on its own, even without treatment, he's going to come back to a previous level of functioning, so—

Q It can happen every five minutes?

A No, no. It would not be that quick. I mean, and I don't have enough information. In other people it can happen sometimes several times a day would be very, very fast. Sometimes it's years. So it has a long variation.

Q So it would be abnormal for him, what I'm hearing you say, it would be abnormal for Mr. Cooper to snap in and out of it, it would take longer than that?

A Meaning momentarily, yes.

Q How long would you normally expect him to be involved in this episodic disorder?

A Well, the only information we have really comes from Eastern State Hospital and I would think that at least from that data—and he was in a complete different [203] environment that it was, I don't know how long before Edith King had evaluated him that he had been there, but at least from the time that he was in Eastern State until the time that he apparently was out of the disorder was about a month.

Q So, if he was all right the day he came to court on the 4th in the morning, you wouldn't have expected him to have these kind of manifestations of the disorder in court, would you?

A Right.

Q And another thing, I'm sorry, another thing, if he was all right the morning he came to court on the 4th?

A You mean yesterday?

Q Yes. You wouldn't have expected him to be under the symptoms of this disorder the day before, then snap out of it and snap back into it the day of court? That's what you're saying, right?

A Right.

* * * *

[204] * * * A Again, how much of what we're seeing is malingering, I think some part of it is malingering, I think some part of it is the disorder.

Q If we put it on a continuum from zero to a hundred, you really don't know how much on what end, do you? How much is malingering and how much of it is the disorder?

A For most of the actions, yes, I don't know. * * * It would take a lot more study. At the same time, the fact that both are present, I think, is the more important finding. * * *

Q And the kind of time you're talking about is what they would have utilized at Eastern State Hospital for the three months from August 27th to November 26th that he was there, of 1990?

A Uh-huh.

Q Okay. And when he went down to Eastern after Dr. King looked at him, they had a history that was a lot like Noryb or Norid or whatever his name is—

A Right.

[205] Q And that his mama was dead, that was part of it, right?

A He told me last night that his mother was dead.

Q But that's the same thing he was saying back then according to the records, right?

A That's correct.

Q And that his lawyer was trying to kill him?

A That's correct.

Q That's true. And during the three-month initiated by Dr. King, the three months at Eastern, the doctors all thought at first that he was really sick, that he was psychotic, schizophrenic, right?

A What I'm saying is that he probably was psychotic, he was not schizophrenic, although it's hard when you take a snapshot of somebody to be able to know without a knowledge of the force of the illness, is this schizophrenia or is this psychosis of another fashion.

Q Dr. Murphy, the truth is, though, as you told me in the hall that Dr. King, in your opinion and the doctors at Eastern when they first diagnosed him in calling him schizophrenic, they were wrong?

A In that diagnosis, right.

Q Sure.

A But not in the diagnosis of psychosis, which is a more general term.

[206] Q Okay. Psychosis. That's having any disorder, right?

A Psychosis is having a serious disorder which basically gets in the way of your being able to have sufficient contact with reality to be competent, legally.

Q You mean every time anybody has a psychosis they're incompetent legally?

A Yeah, certainly they would be. They're out of their mind. That does not mean that somebody with let's say somebody who's schizophrenic diagnosis, they'll be schizophrenic their entire life. That does not mean that every moment in their lifetime that they are psychotic. Okay? They will go back into psychotic outbreaks from time to time.

Q All right. With Dr. King and doctors at Eastern, what you're telling me is that the wild look that Dr. King so scientifically described and the fact that he wasn't capable of impulse control, those things all led her to believe at the time from this snapshot view that he was schizophrenic?

A That's correct.

Q Now, you're saying that's not right, he was an affect disorder that's not at all related, correct?

A That's correct.

Q Now, Doctor, you also read Dr. Russell's estimation [207] of him when she shipped him back in November?

A Yes, I did.

* * * *

Q And in that report she says that she believed his symptoms are more consistent with classified malingering that it is with any—I think she says psychosis, basically, doesn't she or disorder?

A This is the last line of the report, "Mr. Cooper does not appear to meet the criteria for a clinical syndrome,

however, his symptoms and supporting documentation appear to be indicative of a V code malingering, D.S.M. III-R. I can explain what that means.

[208] Q Go ahead.

A At the time when he's being discharged, he is fine. They've got him off all medicine, he's coherent, he's doing fine. So, at that point in time, he does not, an example would be he wouldn't have a cold. He wouldn't be showing symptoms of any particular disorder at that time. And clearly, he also seemed to be based on some of their other—his manipulation on the ward, his—the comment I made about a first class manipulator in the nursing chart, yeah, he probably would warrant a V code malingering. * * *

[209] A * * * It's really all understandable, meaning when he first comes in he's sick. It's apparent to Dr. King, it's apparent to Dr. Patterson, Dr. Lazarica and when you see somebody and you just see them in a psychotic state, especially in America, the first thing you think of is thought disorder. They look schizophrenic.

A normal person who, if they had a breakdown and you saw them acutely ill, they would look schizophrenic. It takes a longer look at the course of the illness to decide in fact is that initial diagnosis of schizophrenia valid or does another diagnosis be warranted.

At the time when Dr. Russell is writing this report, she's looking at him and at that moment in time, after he's been over his episode of effective disorder, he is fine. What she's saying is, hey, there's nothing wrong with this guy and at that moment in time, there isn't anything wrong with this guy. What's she's saying then is, hey, based on his ward behavior, I think he's malingering at this moment.

[210] Now, interestingly, when he was taken off Halidol, he wanted himself to be taken off Halidol and in fact the doctor agreed, Dr. Lazarica.

Also, when they were ready to send him back, he told them I want to go back to court, I'm ready to go back. So that part doesn't hold true with just a simple understanding of him has a malingerer.

Q So, the point is, though doc, that you can't really tell when someone's a good faker, you can't really tell if they're malingering or if they've partially got a disorder or if they're psychotic, you just can't tell?

A I just did tell, meaning last night when I did my evaluation of him, I found that he is in fact malingering. But that's not a total picture. Yes, he is malingering, yes, he has a serious problem, no it is not schizophrenic.

* * * *

Q So, since you don't know on the continuum of one to [211] a hundred or zero to a hundred where the malingering range ends and this disorder that you now describe for the first time begins, it's really very difficult for you to say how much he is able to understand and assist, versus how much he cannot, is that true?

A I don't think so.

Q Explain that.

A Okay. My description of this disorder for the first time is simply based on that I have the luxury of seeing the course of this man's illness, where Dr. King or Dr. Patterson and Dr. Lazarica, didn't have that luxury. They were just seeing him right at the time.

Now, when it comes to his ineffectiveness to aid counsel, I'm basing that not on the fact that this guy will lie at every turn. Okay? And I'm not saying that he won't.

What I'm saying is that there's a confusion right now that makes it very difficult for anybody who's attempting to get good information back and forth from him and that's what the problem is. That type of confusion is probably linked to this affective disorder, therefore, if we can treat that underlying disorder, hopefully, he'll become less confused and a better person to work with when he works with his attorney.

Q Okay. Now, Doctor, the point is that it's certainly [212] possible isn't it, it's certainly possible that this whole affective disorder that you're seeing in him is because he's really good at malingering?

A No, that's not possible.

* * * *

[213] Q Which affective disorder does he have?

A He has either a form of manic depression or major depression recurrent with psychotic features.

* * * *

[219] Q * * * [W]hat does it mean here when it refers to manic episode under mood disorder? What does that mean?

A Basically, you can have a manic episode where a person typically is not in complete touch with reality. They may, for example, imagine that they're a deer or a fawn dancing in the forest. They may stay up for days and days on end without—they may be aggressive. They [220] may glare at you in a strange sort of way. They may, when they shake your hand, try to, not because they really want to, but almost break it. They have all those things are different parts of somebody when they are mad.

* * * *

Q Well, is he in a manic episode or not?

A No, I don't think he's in a manic episode.

Q What's he in?

A Again, what we're saying is that he has severe enough disorder to be looked at in terms of the more serious problems. Those would be along one of two trees. Either a thought disorder or an affective or mood disorder.

When it comes to precisely what exact diagnosis he fits, I don't have the information to say is this man bipolar or is he showing some major depression recurrent or is he showing what would be psychlothymic?

* * * *

[221] A * * * When you can diagnose somebody as bipolar, one, you have to show that they have a probable family history. It's a genetically determined predisposition. And in those people, Lithium has a very high probability of being effective.

I do not know if he's bipolar or not because I don't have the information. Okay? What I do know is that he is showing the effects of affective loss in his life that is making him at times psychotic as he was, for example, back in August of 1990. He is not schizophrenic.

* * * *

[223] Q How could you say, Doctor, that he honestly is afraid of Mr. Mildfelt when you also clearly say that he's not honest?

A Because some people are situational, in fact, most of us are situational. We may lie in one situation and another situation, we're honest. It's part of human nature.

Q That's true, but how are you capable of judging his credibility based on the short time you spent with him, sir?

A Basically, based upon the testing that I did that found what I had said previously that, yes, he is malingering, yes, he has a major disorder. It is not schizophrenia. [224] Q And that told you he was afraid of Mr. Mildfelt?

A No. What the fear to do with Bob Mildfelt has to do with the connection to Noryb which is a consistent delusional persona that he does fear. It's sort of his God/father * * *.

* * * *

Q Would it affect your opinion about how much of this is malingering and how much of this in an affect or disorder to know that he manipulates prisoners and did otherwise?

A I'm sure he manipulates prisoners and I'm sure he manipulated the people at Eastern State. We're not dealing with an either/or. We're dealing with two things coinciding at the same time.

Q So it wouldn't affect your opinion?

A No.

Q What about the fact that he managed to file himself a couple of pro se federal lawsuits on his own. Would that bother you or make any difference?

[225] A No, it would just tell me that the 50 that he earned on the I.Q. test was obviously bogus, which was the way I decided he obviously was malingering.

Q So, I guess bottom line what you're saying is that, at least the way you call it, he can act normally or has acted normally through a great part of, probably most of his adult life, right?

A I can't say that. Certainly he's had periods of where he's acted normally. I don't know to what proportion.

* * * *

Q * * * When you were talking to all the Defense people and the various investigators, did you ask them if there was other indications through his life that he has a documented history of disorder?

A We went over his history and his history has a lot of evidence of abuse and neglect. To what degree any [226] treatment occurred, I'm unaware of it. He has been incarcerated I think a good amount of his adult life.

* * * *

[235] Q * * * [T]he way I understand your review * * * is that he definitely fits under all the mood disorders or at least he fits somewhere under one of those mood disorders, is that correct?

A That's fair.

Q But, he also fits under the malingering disorder?

A Malingering is not a disorder, it's a V code.

Q Excuse me. The malingering code?

A That's correct. That's correct. That's what I began my testimony with a long time ago.

Q If you've got one of these disorders whenever you're not manifesting any of the symptoms of it, are you incompetent then?

[236] A No, meaning you would have to have presently, at the time, symptoms which are going to be interfering with your mental functioning and that would judge at that moment in time whether somebody is competent or not.

Q So if you would have had the opportunity to see him once a month over the last two years and eight months, from what you understand from his file, you would have expected to find times when he was fine?

A I'd think so.

Q You know, you're a doctor, you see a lot of people like this, you wouldn't have said he was crazy all the time, every time you saw him, based on what you understand.

A Yes, you're right.

Again, let me point out that I'm not even saying he's crazy now. What I am saying is that he lacks the ability to competently confer with his counsel. That's the finding I found.

Q I understand what you said. And it's all affected by how much malingering he's doing as to whether he has the ability or the desire, true?

A No, it's not all affected, meaning that is one factor.

Q That's a factor?

A Yes.

* * * *

[239] REDIRECT EXAMINATION

BY MR. MILDFELT:

* * * *

Q Is there anything inconsistent * * * with your diagnosis here today as to his mental condition that he is malingering in part and that he has a real mental condition?

A There's nothing inconsistent.

Q (By Mr. Mildfelt) The bottom line, Dr. Murphy, do you have an opinion as to whether or not his mental

condition is such that he is unable to communicate with his attorney?

* * * *

A I have the opinion that he is unable at the present time to effectively communicate with his counsel.

* * * *

[240] THE COURT: Doctor, what about the next question that follows the one that Mr. Mildfelt asked you, if he's unable to consult with his attorney and rationally assist in his defense, do you think he can attain competency within a reasonable time provided with a course of treatment, therapy or training?

A Yes, I think that he, and I have to speak in probabilities, but I think probably he would be able to, especially if a regimen of Lithium would be instituted. Lithium is a medication that takes a certain amount of time to get the right blood levels on. That would also be, that would provide diagnostic information. Because if in fact * * * that's his specific problem which I haven't identified, then that would show if he gets better by it, then sure enough, it's nailed, diagnostically.

THE COURT: What would you say in terms of time. Are you talking about a couple of weeks or months?

A Well I think that if there was an aggressive approach and they had the facilities to do the blood levels, I think in terms of maybe a month. I mean if he got a good hit on it and they got those blood levels up [241] there, then hopefully they should be, a month or six weeks, something like that, time frame.

* * * *

[244] CHARLES MOREHEAD

Called as a witness on behalf of the State, after first being duly sworn, testified on his oath as follows; to-wit:

DIRECT EXAMINATION

BY MR. MILLER:

Q State your name, please.
A Charles R. Morehead.

Q Speak up.
A Charles R. Morehead.
Q How do you spell your last name?
A M-o-r-e-h-e-a-d.
Q Where do you work?
A Oklahoma County Jail.
Q How long have you worked there?
A Five months.
Q What division or floor are you assigned to?
A It varies from day today, mostly 12.
Q Mostly 12?
A Yes, sir.
Q Is that the maximum security floor?
A Yes, sir.

[245] Q How long have you worked up there, the whole time, whole five months?

A No, sir, about a quarter of the time.
Q What shift do you work?
A Six to two.
Q In the morning 6:00 to the afternoon two p.m.?
A Yes.
Q And during that time six to two, have you had occasion to interact with inmates on the 12th floor?
A Yes, I have.
Q On more than on occasion?
A Yes.
Q How many days a week do you work?
A Six.
Q During those six days a week that you work, do you ever have an occasion to walk amongst the prisoners on a daily basis?
A Yes, I do.
Q Approximately how many times?
A If I'm working a pod, about 10 times a day.
Q Do you now Byron Cooper?
A Yes, I do.
Q Do you see him in the courtroom today?
A Yes, I do.

Q Where's he at?
[246] A Right there in the corner.
Q What's he got on?
A Orange coveralls.
MR. MILLER: Would the record reflect that he's identified the Defendant, Cooper?
THE COURT: The record should so reflect.
Q (By Mr. Miller) Have you ever had occasion to interact with Mr. Cooper while you were working as a D.O.?
A Yes, I have.
Q How many times do you think, ball park, have you had occasion to work the pod that he is on?
A Twenty.
Q Have you had occasion to have any verbal contact and communication with him in those 20 times that you've worked that pod?
A Yes, I have.
Q On those 20 days that you worked that pod, would you have interacted with the inmates approximately 10 times each day?
A Yes.
Q Have you ever, during the four or five months that you've worked up there, observed Mr. Cooper to act in an unusual way?
A No, I haven't.
[247] Q How would you characterize his activities over the last five months?
A Normal activity.
Q Had you ever interacted with him, talked to him?
A Yes, I have.
Q Did you ever have any difficulty in making him understand what you were saying?
A No, I haven't.
Q Have you ever observed him to talk to someone that was not in the room?
A No, I haven't.
Q Hallucination?
A No.

Q Have you ever seen him balled up like a fetus like he's sitting over in that chair today in court?
A No, I haven't.
Q Never seen that?
A On tv last night on the news.
Q Other than tv last night, have you ever seen him?
A No, I haven't.
Q When's the last time, the very last time that you talked to Byron Cooper?
A Yesterday.
Q When?
A Approximately 6:15 I escorted him downstairs so they [248] could feed him before he went to court.
Q 6:15 a.m.?
A Yes, sir.
Q How do you escort him to court?
A We just walk him to the elevator, take him down to the second floor where he's held until they come to pick him up.
Q And yesterday when you were taking him to court, did you notice him talking to anybody that wasn't there?
A No, I didn't.
Q Did you have any conversation with him?
A One other officer asked him what happened to his hand.
Q Did you hear that?
A Yes, I did.
Q Did Cooper respond?
A Yes, he did.
Q What did he say?
A He said he hurt it and that was all he would say.
Q Did you have to ask him more than once or the other officer have to ask him more than once?
A No, just once.
Q How long did it take Cooper to respond?
A Right away.
Q Any other conversation?
[249] A No.

Q How long were you with Cooper yesterday morning?

A Three to four minutes.

Q And during that three to four minutes you saw no abnormal conduct, is that correct?

A No.

Q All right. What was the time before that you last talked to Cooper?

A The day before that.

Q Sunday?

A I believe.

I believe it was Sunday.

Q And where were you at when you talked to him?

A I walked into 12 B pod where he was in his cell.

Q You went to his cell?

A Yes, I did.

Q Why is that?

A One of the officers said that he would like to talk to me.

Q What was he doing in his cell?

A When I walked over he had bent down to talk to me through the little bean hole in the door.

Q You did not open the door?

A No, I didn't.

Q And what was the conversation at that time?

[250] A He told me that he had been in a fight with an inmate by the last name of Bruner and he said that they had made up and everything was cool. That was about it.

Q Do you know why it was that he wanted to talk to you?

A Because Bruner had been calling, Bruner wanted to be moved and he was telling me that everything was fine between him and Bruner, that they made up.

Q Did he have any difficulty in explaining to you the message he thought he wanted to convey?

A No, no problem.

Q Did you ever talk to him and respond to him from the statements that he made to you?

A Yes, I told him I understand that they made up and I'd see what I could do about moving Inmate Bruner.

Q Or not moving him?

A Right.

Q Any other conversation at that time?

A No.

Q All right. Have you ever seen him rub feces on his head?

A No, I haven't.

Q Have you ever seen him do anything with his toilet like put his hand in it and swish it around and stuff?

A No, I haven't.

[251] Q Have you ever heard anybody talk about it?

A Yes, I did, yesterday.

Q When?

A Some investigators from the Public Defender's Office came up and the other inmates told the investigators that he did that.

Q But you never heard them say that before that day?

A No.

Q Have you ever had inmates come and report odd conduct of other inmates?

A Of other inmates, yes.

Q Is it common, in your opinion, that they would come and report it?

A Yes.

MR. MILDFELT: Your Honor, I object to it.

MR. MILLER: Five months, Judge, working up there.

THE COURT: What others do? I don't know that that is—I guess it might show some kind of course of conduct of the inmates up there.

I'll sustain the objection.

MR. MILLER: That's it.

CROSS EXAMINATION

BY MR. MILDFELT:

Q Officer Morehead, if I understood correctly, about a [252] fourth of your time of that five months has been on the 12th floor, is that correct?
A Yes, sir.
Q Where are you assigned now?
A Today I work the 4th floor.
Q The what floor?
A The 4th.
Q Where did you work yesterday?
A The 12th floor.
Q Okay. The day before that?
A The 12th floor.
Q The day before that?
A I believe the 10th floor.
Q Don't you all usually stay in the control room rather than out on the pod? You all don't spend a whole lot of time out in the pod with the inmates, would that be a fair statement?
A Yes.
MR. MILDFELT: I have nothing further.
THE COURT: Anything further?
MR. MILLER: Next witness, Judge, I'm ready for.

(Witness sworn.)

STEVE CARRELL

Called as a witness on behalf of the State, after first [253] being duly sworn, testified on his oath as follows; to-wit:

DIRECT EXAMINATION

BY MR. MILLER:

Q What's your name, please?
A Steve Carrell.
Q Where do you work?
A Oklahoma County Sheriff's Department.

Q How long have you worked there?
A Since December of '91.
Q Are you over in the new jail now?
A Yes, sir.
Q What floor do you usually work?
A I work all floors.
Q What shift do you usually work?
A Six a.m. to two p.m.
Q Have you ever had occasion to come in contact with Byron Cooper?
A Yes, I have.
Q On more than one occasion?
A Yes, sir.
Q Approximately how many times?
A Six to eight times.
Q Do you see him in the courtroom today?
A Yes, I do.
[254] Q Where's he at?
A Right there.
Q What's he got on today?
A Orange.
MR. MILLER: Would the record reflect he's identified the Defendant, Cooper?
THE COURT: The record should so reflect.
Q Do you see how he's sitting over there today?
A Yes, sir.
Q All balled up like that? Have you ever seen him sit like that before?
A No, I have not.
Q I want to direct your attention to Monday morning, yesterday.
A Yes.
Q Did you have occasion to see him Monday morning?
A Yes I did.
Q What time?
A In between the hours of 6:45 to 7:30.
Q 6:45 to 7:30. Where were you at?
A I was in the same pod as he was.

Q What was the purpose of being there?

A I was watching several inmates that were fixing to eat breakfast before they were transported over to court that morning.

[255] Q Would these be some of the inmates that officers brought down from where they stayed?

A Yes, it would.

Q And was it your job to observe them the whole time they were there?

A Yes, it was.

Q And during this 45 minutes, did you have occasion to observe Mr. Cooper the whole time he was there?

A Yes, I did.

Q What did he do?

A Basically walked around, had a conversation with another inmate, ate, drank coffee.

Q Ate?

A Ate.

Q Breakfast?

A Yes.

Q What did he have, do you remember?

A I believe it was either oatmeal or rice and toast. I'm not sure.

Q Okay. Do you know if he ate it all?

A No, I do not.

Q But you saw him eating at different times?

A The several inmates that I watched, I have to watch each one of them grab a tray, but I did not see him for sure eating at all. I just know he had picked up a tray [256] and took it to his table.

Q And how long did he sit there in front of his tray while he was with the food?

A About 25, 30 minutes.

Q And when did he have the conversation with the other inmate?

A About seven to probably 7:10.

Q Where was he at when he did that?

A Standing by the table that he was eating at.

Q Did they have any difficulties between them?

A No, they did not.

Q Did it appear that Mr. Cooper was talking and understanding what the communication was all about from what you could see?

A Yes, it was.

Q During the 45 minutes that you observed him during breakfast did you ever see him talking off to somebody that wasn't there?

A No, I did not.

Q Did he act out of the ordinary from the six to eight times you've seen him?

A No, sir.

Q In any way?

A No, sir.

Q Have you ever seen him act out of the ordinary?

[257] A No, I have not.

Q If he'd have started talking off to somebody that wasn't there up in the sky or something, what would you have done about it?

A Went over and asked him if there was anything wrong, if he needed some help.

Q And could you have got help for him?

A Yes, I could have.

Q Did you have any conversations with him?

A Yes, I did.

Q Okay. And what was the conversation about?

A I had asked him if he'd gotten into a fight.

He said yes. Talking about why he had moved from pod 12 A to pod 3 B and back to A and then back to B.

Q Did he make sense when he was telling you all this?

A Yes, he did.

Q Did you know what he was talking about?

A Yes.

Q Did you ever have to ask him to repeat himself or explain it?

A No, I did not.

Q Did you ever ask him any questions about it while you were conversing with him?

A Pardon?

[258] Q Well, did you say something like, well, who did you fight or anything like that?

A I asked him who it was but he told me but I cannot remember who it was at this time.

Q Okay. But what I mean, sir, is when you asked him the question about who it was, did he respond to you?

A Yes, he did.

Q Did he appear to know what he was saying when he said it?

A Yes, he did.

Q Did you have to ask him more than once?

A No.

Q Did you ever have to ask him any question more than once?

A No, I did not.

Q How long did that conversation go on?

A Five, 10 minutes.

Q I want to be sure about this now. This was yesterday morning?

A Yesterday morning.

MR. MILLER: Thanks. That's all, Judge.

CROSS EXAMINATION

BY MR. MILDFELT:

Q Officer, how many pepole were down there eating breakfast when you were watching?

[259] A Approximately 16, sir.

Q Was that your job to watch them eat breakfast?

A Yes, it was.

Q Did you have a conversation with all of them?

A No, sir, I did not.

Q Was it just Mr. Cooper you had a conversation with?

A Him and two other residents had asked me questions.

Q And this conversation you had with him lasted five to 10 minutes for him to explain to you or are you just guessing on that?

A Approximately five or 10 minutes.

MR. MILDFELT: Nothing further.

* * * *

[261] [By Mr. Mildfelt]

I got him up in the stand and the closer I would get to him—and I didn't invade his space to the point where he would strike back at me, but I would do it subtly and slowly and I didn't take large leaps or moves. And he watched me so intently with his eyes and I watched his eyes and I don't believe that that man was faking * * *.

Every time I would get close to his space where [262] he is seated in this little witness enclave that is surrounded by these boards that are all nailed together and stained up real pretty that encloses this witness chair, he would stand up and he would get away from me as far as he could and so I would back off and I'd give him a little space. And I would talk to him again and he'd sit down and I'd get close and he'd back up. And whichever way that I would go at him, he would move away from me. And I remember when I went to the north end of the chair and I leaned towards this way, that he started to crawl over this railing onto the court reporter's table.

All that could have been a show. I still backed off. He sat in the chair again. So, I've approached him from every side. I've approached him from all ways this way except I haven't approached him from the front. So yesterday, I approach him from the front. And that's the last thing I did. I regret doing that.

He stood up and he got as far back against the rail behind the witness chair as he could get. I edged closer. He got as far back and he got up on that rail. So I've got him up on the rail and I'm thinking, hey, what can I lose? Let me just see what he does now because he can go no further back, but as the Court knows, there's a

space of about two-and-a-half feet [263] behind this rail and a marble wall.

Without looking for his safety at all and looking what's behind him, when I moved the least bit and I didn't move very far towards him, he fell to get away from me. He fell. He hit his head. The thud on that marble when he jacknifed backward off of that railing into that marble could be heard at the back of that courtroom. * * *

We got him back up here in the witness enclave, he's just busted his head, tears are streaming down his eyes and he does not respond in any normal fashion. He starts talking that Noryb is going to be mad at him. That Noryb is going to angry with him. And he was crying and that wasn't faking. And I don't think anybody in the courtroom, Marlon Brando in his finest hour could not have faked that under that kind of pain and that kind of trauma, it cannot be done. And he was not responsive to the situation. He should have been mad at me, he should have been mad at you, he should have been mad at the deputies. Instead, he's afraid because he has this fear that Noryb's going to be angry with him. * * *

[264] * * * Dr. Murphy says, yeah, a lot of him is malingering but there's one thing he's not malingering. He has a mental condition and that mental condition—and first of all, he says he is genuinely, Byron Keith Cooper is genuinely afraid of me, which makes me sad because I am his lawyer. I am his chief trial counsel and he is genuinely afraid of me.

But I asked the doctor, bottom line, can he communicate with his attorney? He cannot. Is it treatable? It is. That is the question that the Court has to decide.

Based on that evidence, I don't think there's any question but that there is a doubt as to his present competency. It can be cured and it can be treated, but it does exist, Your Honor.

MR. MILLER: It probably won't surprise the Court that I don't think that there is any doubt but that he's competent. But I think we're past the doubts or no [265]

doubts stage. When I read 1175.3 and 1175.4, we've already had the doctor look at him. The Court ordered it. We've already had a doctor testify about the five factors that the doctor's supposed to examine the Defendant for. The first two being the most important, whether he's able to appreciate the charges, whether or not he is able to consult his lawyer. That's done and the doctor says kind of a hodgepodge of things, but the bottom line, we know he's a malingerer and that some vague affect or mood disorder, he says, is present.

Judge, the next step once you have the doctor's testimony about that is 1175.4. And it says that it's the Defendant's burden to come forward with clear and convincing evidence that a person is incompetent. More importantly, Judge, it says a person shall be presumed to be competent. Presumed competent, Judge. And what do we have to support that presumption and refute any evidence that he is clearly and convincingly incompetent?

Number one, the doctor, while he was resolved that no matter what else he said he was going to stick in there some disorder from the D.S.M. III.

First, it was manic depressive and then it was manic depressive and this other deal, major depressed disorder and then it was everything under the mood disorder category and then maybe it was all those things [266] plus P.T.S.D., Post Traumatic Stress Disorder. Those are the different or ranging variations that the doctor presented us as far as possible disorders, because he doesn't know.

All he does know for sure and the only other thing he was resolved about and as is clearly defined in D.S.M. III-R as the mood disorder is that this man is a malingerer. He's a classic example of one. He lies. He's faking everybody out. The doctor said specifically that all that stuff that he heard from the jail that the Defendant supposedly did and I don't know whether he did it or not, but all that was a bunch of faking. It was

aspects of the malingering is what the doctor called it. He didn't put anything into any of that.

Next he said that he was malingering on part of the diagnostic testing. Next he said that this business in court the last two days, that's malingering. It's an aspect of malingering, he used the term, the same term. In other words, that's not part of this disorder that we've heard so much or so little about, actually.

And finally, he concedes that three other doctors, two of whom who saw Cooper for three whole months, for at least certain parts of the time that they saw him, thought he was schizophrenic but they're wrong.

Then they thought he was a malingerer, but [267] they're wrong. Because he is a malingerer with an affect disorder. Who's right, Judge? Has he established or have they have established by clear and convincing evidence that he's right?

Here's how we've shown he's not. The doctor said that if he was really under the effect or the symptoms of an affect disorder, mood disorder then he couldn't just snap in and out. He would specifically not expect Cooper to be okay the morning before court yesterday, specifically. That he was bad last week, okay yesterday morning and then bad when he crossed the threshold here in the courtroom.

But that's exactly what we've shown you he did. We've got officers who have been up there with him for four or five months as the first officer yesterday. He said he'd never seen anything like this business, never heard anything about any of this business. He's talked to Cooper many times. There was never a problem.

As recently as April 15th, Cooper coherently talked about his testimony in another criminal case in a courtroom. Whether he would lie or not. Since that time he's written you this letter. The doctor said that was—told me out in the hall it was a bunch of bull but in court he said it was an aspect of malingering again.

On the day of Court, Judge, he's brought down [268] by one officer. There's a conversation about his injuries, he's coherent. There's none of this talking off or spouting off. The next officer, he's sitting at the table, probably eating his breakfast, definitely with his breakfast, 45 minutes, five to 10 of which he has a coherent, somewhat lengthy involved conversation about different pods and being moved and not being moved and the officer understood all of it and Cooper never had any difficulty with him.

That is a wholly different person than the individual who would answer questions that were not too difficult for him yesterday that he did not feel like he'd be trapped in, and the person that upon being posed very difficult questions, just like when he talked to the doctor last night, he just sat there quietly. All balled up. He's faking. That's the way it looks to me.

Now, I know it's been a few weeks ago since he's filed these, but I think it's pretty telling about his intelligence and his ability to run a game on all of us and to cause this hearing for the last day and a half when you look at those lawsuits. We can't prove yet, and maybe before it's over, I'll be able to. We can't prove yet that he wrote every word of the lawsuit, but we know he signed under a certification, he admits he can read that says he had read them and all facts are true and [269] correct. And he put his name and his name is several places throughout that lawsuit. He did it twice, once in October and once in January.

And then as recently as a week or two weeks ago, Mr. Nolan serves him some papers up in the jail and Cooper knows exactly what they're all about. Doesn't ask a question about them, he just starts reading them.

There's nothing consistent about this, Judge, except that when he gets in the courtroom, he's a faker. He doesn't want to pay the piper here. He doesn't want to run the risk of the jury trial. I say after two years and eight months, after already being looked at by this doctor

and all the testimony you've heard, they have not shown by clear and convincing evidence under 1175.4 that he is incompetent.

MR. MILDFELT: Your Honor, may I briefly respond?

THE COURT: Sure.

MR. MILDFELT: And it will be very brief.

Apparently, Mr. Miller doesn't think you can be a malingerer and have this disorder. That is incorrect, according to the doctor. If you will remember last Wednesday I said, not once but I think twice, two of my investigators have a doubt as to his competency. We will pay for it. Mr. Miller can pick the psychiatrist or the [270] doctor. He chose not to. We picked a doctor on short notice yesterday because we were set for trial and now he faults the doctor's findings.

Those are the doctor's findings. He's a qualified doctor. He's given his sworn testimony here. His sworn testimony is that this man cannot communicate with his lawyer. We have met our burden of proof. * * *

[271] THE COURT: Well, it looks to me like 1175.4, A, paragraph B says, "The court at the hearing on the application—", which is what we just completed, "shall determine by clear and convincing evidence if the person is incompetent. The person shall be presumed to be competent for the purpose of the allocation of the burden of proof and burden of going forward with the evidence."

Well, I think I've used the expression, I know I've talked to Mr. Mildfelt and said in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper definition that we are to use with incompetence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else.

I respect Dr. Murphy and I don't dispute Dr. Murphy's diagnosis. He examined Mr. Cooper under adverse circumstances and hastily and has seen just a limited ex-

posure to Mr. Cooper. I don't fault him for that. From what he observed, he's probably accurate.

But you know, all things considered, I suppose it's possible for a client to be in such a predicament that he can't help his defense and still not be incompetent. I suppose that's a possibility, too.

I think it's going to take smarter people than [272] me to make a decision here. I'm going to say that I don't believe he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we're going to go to trial.

DISTRICT COURT OF OKLAHOMA COUNTY

(Title Omitted in Printing)

TRANSCRIPTS OF JURY TRIAL PROCEEDINGS HAD ON MAY 5-22, 1992

[The following record was made at the bench on May 5, Vol. I, page 9.]

MR. MILDFELT: And the Court knows he's sitting over there in the corner. He's not going to be sitting next to me. He will not allow me within about two-and-a-half to three feet of him. I think that's probably about the closest I could get to him yesterday or last Wednesday before he would shy away and back from me.

The Court, if the Court so orders me, I'm going to be trying a case with a man that I can't even get close to, and yet, I have got to be able to turn to him and ask him questions when witnesses testify. And I can't do that. Number 1, he can't communicate to me. Number 2, I can't get close to it and there's a medical [10] basis for that. And so I'm not ready.

[The following exchange took place at the bench during voir dire of the jury on May 5, Vol. I, pages 120-122.]

THE COURT: What did you want to say Ms. Ervin?

PROSPECTIVE JUROR ERVIN: Well, I just feel that I think he comes across to me as just creepy.

THE COURT: As what?

PROSPECTIVE JUROR ERVIN: Creepy. That's all I can say.

THE COURT: Oh, well, yeah, but you know about judging the book by the cover, don't you?

PROSPECTIVE JUROR ERVIN: I know that. But—

THE COURT: You know, it would probably be appropriate in a lot of cases for the Defendant not to even be present where you wouldn't even look at him, and [121] you make a decision based on the evidence without ever seeing the fellow.

PROSPECTIVE JUROR ERVIN: I understand that. I just feel like I couldn't be fair.

* * * *

THE COURT: * * * He does look creepy, but we're not going to find him guilty because he looks creepy. * * * Are you saying, though, that you're leaning toward guilty just because of his appearance and the charge that he's got against him?

PROSPECTIVE JUROR ERVIN: Right.

[122] THE COURT: Are you leaning that way so that you don't think you can be fair about the case?

PROSPECTIVE JUROR ERVIN: Yeah.

* * * *

MR. MILLER: Ms. Ervin, you said earlier that you understand that all Defendants are presumed innocent?

PROSPECTIVE JUROR ERVIN: Right. I understand that.

MR. MILLER: And I think you said that you would be willing to look at the case that way basically. Is that true?

PROSPECTIVE JUROR ERVIN: Right.

MR. MILLER: Have you changed your mind or * * * are you still ready to do that?

PROSPECTIVE JUROR ERVIN: I don't think I could do that.

* * * *

THE COURT: I'll excuse you, Ms. Ervin.

[The following excerpts are from voir dire of the jury on May 6, Vol. II.]

[144] MR. MILDFELT: * * * That's my client. Has everybody noticed he's dressed in orange? * * * And

would you notice that he is not participating in the proceedings? * * * And do you agree his hair is sticking out like this?

* * * *

[145] MR. MILDFELT: * * * It would be a fair statement you're able to see him, and he's dressed in orange jail uniforms, he's seated over there in a chair about five feet from me, and he has his head down and he looks like he's taking a nap. Is that a fair assessment of the description I've given of my client?

PROSPECTIVE JUROR JENNINGS: That's my impression.

[147] PROSPECTIVE JUROR DENTON: Just from his body language and the way he appears withdrawn from everything that's going on in here, he could either be guilty or he could be depressed or he could be tired.

[The following excerpt is from cross-examination of State's witness Sidney Asher on May 11, Vol. V, page 75.]

Q Twice as big as this guy sitting over there in the fetal position. Is that right?

A That's right.

[The following discussion took place at the bench on May 12, Vol. VI, page 132.]

THE COURT: Mr. Ravitz, do you want to make a record on something?

MR. RAVITZ: Yes, sir, Judge. * * * First of all, just for the record Mr. Cooper is still dressed out in orange coveralls sitting in the back * * *. He, from time to time, talks in a very loud voice. It's obvious that the jury can, in fact, hear him, though he has not been disruptive. But I don't think anybody can hear what, exactly, he's saying. I can't and I'm closer to him. He does not seem to be paying any attention to the trial and, from time to time, sits in a fetal position.

[The following discussion took place at the bench on May 14, Vol. VIII, pages 135-144.]

DEPUTY WILLIAM GRIMSLEY: * * * Deputy Albertson asked me what he had in his hand. I said it looks like candy, which he had access to through commissary in the jail. And there's a real heavy odor of feces in the area. And I look at it close, and it doesn't look like candy.

THE COURT: Do you think it's feces?

DEPUTY WILLIAM GRIMSLEY: Yes, sir, I do.

MR. MILDFELT: I'd tell the Court that it is. I smelled something, but I thought it was just bad breath, or something, and I thought, boy it's pretty [135] strong, but I did not say anything about it. I just didn't know that my client was over there * * * eating feces.

MR. MILLER: Well, now, did anybody see him eat it?

MR. MILDFELT: Apparently the bailiff did.

DEPUTY WILLIAM GRIMSLEY: Both of us did, Your Honor.

MR. RAVITZ: * * * Again, Judge, for the record, * * * it's our contention that Mr. Cooper is incompetent, that he does not understand the proceedings against him.

MR. MILDFELT: And he's babbling over there right now as we're speaking and has been continually.

MR. RAVITZ: He's been babbling off and on, and sitting in a fetal position. Again, it's our contention that the Court used the wrong standard in deciding competency. And again, we'd ask the Court to discontinue the trial and commit Mr. Cooper to a mental hospital.

* * * *

[137] THE COURT: Let the record reflect that Mr. Cooper was taken upstairs by the deputies at my request, * * * and now they are returning to the [138] courtroom. And * * * what do you have to tell us?

DEPUTY GRIMSLEY: We took Mr. Cooper upstairs, put on a pair of rubber gloves, extracted the material from his hand, and I smelled it and it had the definite oder of human feces to it, at which time I placed

it into a rubber glove, tied a knot in it, and placed it in a paper bag. * * *

MR. RAVITZ: And in your opinion, that is what he was eating?

DEPUTY GRIMSLEY: That is correct, sir.

MR. RAVITZ: You have no doubt about that?

[139] DEPUTY GRIMSLEY: No doubt.

MR. RAVITZ: Okay. And subsequent to that he, evidently voluntarily threw up. Is that correct—or involuntarily threw up. It wasn't of his own accord. Is that correct?

DEPUTY GRIMSLEY: Upstairs, yes, he did, sir.

* * * *

[141] MR. MILDFELT: Did you tell him to wash his hands an [sic] clean up when you took him upstairs? * * *

DEPUTY ALBERTSON: I told him to get cleaned up.

MR. RAVITZ: Judge, again, we would move for a mistrial. We do not believe Mr. Cooper is competent to aid and assist us. If the Court remembers the testimony of Dr. Murphy, stress can cause this type of situation. * * * [142] We would ask the Court to continue this matter if they're not willing to grant a mistrial and appoint an independent expert to advise the Court as to the competency of Mr. Cooper. * * *

MR. MILDFELT: And, Judge, I think the record should be clear that since this trial has started Mr. Cooper has never spoken to me. I have attempted to speak to him because the doctor testified last week that he was scared of me. I couldn't communicate with him. To my knowledge, he hasn't spoken to Mr. Ravitz, either. And that's two weeks of trial tomorrow.

MR. RAVITZ: That is correct, Judge.

* * * *

[144] THE COURT: Well, of course, I heard all that testimony and evidence and I don't claim any special knowledge, you know, of psychology or psychiatry. I just have to do the best I can with the tools I've got to work with. I'll overrule your motion. We'll go ahead and go on to the end of this thing.

MR. RAVITZ: We move for a mistrial based on the Court's ruling.

THE COURT: Overruled.

COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. F-92-533

BYRON KEITH COOPER,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

Jan. 10, 1995

Rehearing Denied Feb. 13, 1995

An Appeal from the District Court of Oklahoma County; Richard J. Freeman, District Judge.

Byron Keith Cooper, Appellant, was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp. 1982, § 701.7(A)) in Case No. CRF-89-5084-7, in the District Court of Oklahoma County. The jury found the existence of five aggravating circumstances and recommended punishment of death. The trial court sentenced accordingly. From these judgments and sentences Appellant has perfected this appeal. The Judgment and sentence for First Degree Murder is AFFIRMED.

OPINION

LUMPKIN, Presiding Judge:

Appellant Byron Keith Cooper was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp. 1989, § 701.7) in the District Court of Oklahoma County, Case No. CF-89-5084. The jury found the existence of five (5) aggravating circumstances (Appellant was

previously convicted of a felony involving the use or threat of violence; the murder was especially heinous, atrocious and cruel; the murder was committed to avoid arrest or prosecution; the murder was committed while Appellant was serving a sentence for a conviction of a felony; and Appellant posed a continuing threat to society) and recommended punishment of death. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal. We affirm.[1]

I. FACTS

Eighty-six-year-old Harold Sheppard was found dead in his home at Northeast 13th and Fonshill streets by a friend who was helping him with plans to renovate his home. The victim's wife had died years earlier and his daughter lived in another state. Mr. Sheppard lived only with his little dog, which authorities found protecting the victim's body. He was found on September 8, 1989; based on interviews with people in the neighborhood, authorities estimate he died on September 4, after being stabbed to death that same evening.

A former cocaine dealer who sold drugs in the area frequented by Appellant witnessed Appellant's arrest by detectives on September 19. The dealer testified that a week or two before the arrest, Appellant had approached him, showed him a credit card with someone else's name on it, and offered to purchase merchandise in exchange for cocaine. The dealer could not remember the name on the credit card, but remembered the first name started with "H." The dealer initially refused; but after Appellant persisted, said he could use a watch. A short time later that same day, Appellant returned with a gold Seiko watch. An acquaintance who happened to be present

[1] In so doing, we note the following: this case was filed December 7, 1992; it was fully briefed and at issue April 4, 1994; and it was submitted to this Court on May 4, 1994.

during the exchange said he wanted a watch, too. Appellant told him he would get him one.

On September 5, the day after Mr. Sheppard was killed, Appellant used Mr. Sheppard's J.C. Penney credit card to purchase watches. One watch, a goal Seiko, was bought at the J.C. Penney store in Shepherd Mall; the other at the Penney store in Crossroads Mall. Both were purchased the same day. Authorities became aware of the purchases less than two weeks later, when the victim's daughter received the bill for the purchases. The clerk at the Shepherd Mall store remembered the purchase at her store. In fact, she was suspicious because Appellant did not look like the kind of customer to whom Penney would issue a credit card. She attempted to call Harold Sheppard, the name on the card, during the remainder of the week; no one ever answered the telephone. She later gave authorities Appellant's description and a composite drawing, which was distributed to law enforcement personnel.

On September 19, detectives spotted Appellant in the vicinity of Northeast 4th and Laird. When they turned their car around to investigate further, Appellant began running from them. When he was apprehended a short time later, he was carrying a portion of a car antenna commonly used as a pipe to smoke crack cocaine.

Appellant was questioned by authorities for several hours. During the interrogation, Appellant admitted murdering not only Harold Sheppard, but also Monteen Warner, whose body was discovered on September 17, 1989 at her home at 1021 Northeast 6th Street (evidence of the Warner homicide was not presented until the second stage). However, Appellant also retracted the admissions, and denied being inside either residence. Appellant denied being involved in a murder at 13th and Fonshill, despite the fact detectives had not told him Mr. Sheppard's house was located at that intersection and despite the fact Appellant told the detectives he had not

heard anything about the murders in the news media. Toward the end of the interview, Appellant conceded he may have committed the murders, but could not remember.

Appellant had been staying with Walter Sam Ray, a man he met in prison. At that apartment, authorities found two box-type cameras which Mr. Sheppard's daughter identified as belonging to her father. Also found at the apartment was a watch which had belonged to Mr. Sheppard. Using chemical reagents, technical investigators discovered traces of blood on a shoe, sock and blue jeans, all belonging to Appellant and all found in a box of Appellant's belongings in Ray's apartment. Two hairs which were microscopically consistent with Mr. Sheppard were also found on one of Appellant's shoes found at the apartment.

At Mr. Sheppard's house, authorities found Appellant's fingerprints on a flashlight, a metal can, a watch case, and a carton of Salem cigarettes, the brand Mr. Sheppard smoked. Appellant's prints were also found on the charge receipt he signed at the Sheppherd Mall J.C. Penney store. Authorities found a Viceroy brand cigarette butt on the kitchen floor. Appellant had a pack of Viceroy brand cigarettes when he was apprehended. Appellant is a non-secretor, meaning his blood type cannot be discovered in other bodily fluids such as saliva. No blood type could be detected from the Viceroy cigarette butt, indicating that if saliva were left on it, the person who did so could be a non-secretor.

Appellant in the police interview could not explain how his fingerprints could have been placed on the items in Mr. Sheppard's house. However, he did say if he had killed the man, his prints should have been found on the weapon, and he was certain they would not be. Authorities found a butcher knife in the draining board in the victim's kitchen. No prints were found on the knife, and there was no visible blood; however, when a chemical

reagent was sprayed on the knife, the blade exhibited swipe marks which would be exhibited if blood on the blade had been wiped off.

II. PRE-TRIAL ISSUES

A.

For his first proposition, Appellant complains the authority used to determine competency is unconstitutional. A sizeable portion of pretrial proceedings focused on Appellant's competency. His attorneys complained he would not communicate with them and that he thought his lead attorney was a devil who wanted him dead. A non-jury competency hearing was afforded Appellant in December 1990 and January 1991 pursuant to sections 1175.1 through 1175.8 of Title 22, at the conclusion of which Appellant was adjudged competent to stand trial.

Appellant acknowledges a hearing was held, but complains the presumption of competency, combined with the requirement he show incompetency by "clear and convincing" evidence, 22 O.S.Supp.1985, § 1175.4(B), is such a harsh standard it is violative of his right to Due Process of Law. He argues the standard of proof on him should have been preponderance of the evidence.

It is a basic precept that statutes are presumed to be constitutional and the person alleging their unconstitutionality has the burden of proof. *Newton v. State*, 824 P.2d 391, 396 (Okl.Cr.1991); *State v. Hunter*, 787 P.2d 864, 865 (Okl.Cr.1990); *Nunley v. State*, 660 P.2d 1052, 1056 (Okl.Cr.1983), *cert. denied*, 464 U.S. 867, 104 S.Ct. 205, 78 L.Ed.2d 179 (1983).

The statutory reference to "competency" covers two requirements: a defendant must have sufficient ability to consult with an attorney; and the defendant must be able to understand the nature of the charges and proceedings being brought against him. 22 O.S.1981, § 1175.1. The question of a defendant's competency can be raised by the

defendant, his attorney, the prosecutor or even the court; however, it must state facts "sufficient to raise a doubt" in the court's mind of the defendant's competency. Any such application and sufficient notice must be provided the defendant and must contain certain facts and rights. 22 O.S.Supp.1983, § 1175.2. Once such an application is filed, the court must hold a hearing to examine the application. The court may also entertain other evidence pertinent to the question at that hearing. A court finding merit to the application must order an examination by doctors or appropriate technicans, who shall examine the defendant and determine if he can appreciate the nature of the charges; if he is capable of assisting his attorney; and other questions concerning the attainment of competency (if incompetent), whether the defendant is mentally ill, and whether he poses a threat to himself or others if released without treatment. 22 O.S.Supp.1990, § 1175.3. Following an initial determination by doctors or technicians and upon application, the court is required to hold a hearing on the competency issue. At that hearing, the defendant is presumed competent, and must prove by clear and convincing evidence he is incompetent. 22 O.S.Supp.1985, § 1175.4.

Medina v. California, 505 U.S. ——, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) is dispositive of Appellant's argument he cannot be presumed competent. *Id.* at ——, 112 S.Ct. at 2575, 120 L.Ed.2d at 363 ("Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977)).

In *Medina*, the criminal defendant bore the burden of proving his incompetency by a preponderance of the evi-

dence. Oklahoma law requires he prove his incompetency by clear and convincing evidence. To determine whether this offends notions of Due Process requires some discussion of allocation of proof and fundamental concepts of Due Process.

Exactly what "due process" is has never been satisfactorily defined. This Court has stated it is "older than written Constitutions," and the phrase "is synonymous with 'law of the land' as found in Magna Carta." It then concluded the phrase "intended the general law which reads before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." *Ex Parte Hollins*, 54 Okl.Cr. 70, 75, 14 P.2d 243 (1932); *see also Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L.Ed. 629, 645 (1819) (same). This Court has also defined it as a provision intended "to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with, or suspected of, crime by those holding positions of favor and authority." *Lyons v. State*, 77 Okl.Cr. 197, 232, 138 P.2d 142 (1943), *aff'd*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), *overruled on other grounds, Hopper v. State*, 736 P.2d 538, 540 (Okl.Cr.1987). The law is "due process" when it operates on all alike during the regular course of its administration through the courts, and does not subject one to the arbitrary exercise of the powers of government. *Shaw v. State*, 76 Okl.Cr. 271, 134 P.2d 999 (1943) (syllabus); *see also Ward v. State*, 444 P.2d 255 (Okl.Cr.1968), *cert. denied*, 393 U.S. 1040, 89 S.Ct. 665, 21 L.Ed.2d 588 (1969) (Requirements of due process are met if a criminal trial is held according to a settled course of judicial proceedings).

Perhaps the best exposition on the characteristics of due process occurred in an 1878 New York case, where the writer said:

> It is difficult to define with precision the exact meaning and scope of the phrase "due process of law." Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." (*Davidson v. Board of Administrators of New Orleans*, 17 Albany Law Journal, 223) It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process without this. In his argument in the *Dartmouth College case* (4 Wheat., 519, 4 L.Ed. 629), Webster defined "due process of law" as a proceeding "which proceeds upon inquiry and renders judgment only after trial." Mr. Justice Edwards in *Westervelt v. Gregg* (12 N.Y. 209) defines it as follows: "Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." . . . .; and if found to be suitable or admissible in a special case it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.

Stuart v. Palmer, 74 N.Y. 183, 191, 194 (1878); *see also Brown v. Board of Levee Com'rs*, 50 Miss. 468, 478-79 (1874) whether written *"per legale judicium pariu, suorum, rel per legem terrae"* as found in the Magna Carta; "by the law of the land, or the judgment of his peers"; "due process of law"; "due course of law"; or

"according to the law of the land," all have the same general interpretation); *Westervelt v. Gregg*, 12 N.Y. 202, 209 (1854).

However, the term also denotes more than simply the law of the land or the law as it was at the time the constitution took effect:

> . . . . For that would seem to deny to the legislature the power to alter, change, or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies.
>
> The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.
>
> It refers to certain fundamental rights which that system of justice, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due course of law."

Brown, 50 Miss. at 479.

One thing is clear: whatever Due Process is, it is not a wide-open, catch-all provision to be used by every defendant who loses a pretrial motion or by any appellate court that may not agree with the trial court results. As the Supreme Court has observed: "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2576, 120 L.Ed.2d at 362 (quoting *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990)). Indeed, as the *Medina* court continued:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Accord, *Estelle v. McGuire*, 502 U.S. 62, ——, 112 S.Ct. 475, 481, 116 L.Ed.2d 385 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, n. 6, 74 L.Ed.2d 646 (1983).

Medina, 505 U.S. at ——, 112 S.Ct. 2576, 120 L.Ed.2d at 362.

From this, we can gather that, however due process is defined, it is satisfied if a defendant has notice [2] and a right to be heard at a public proceeding at which all constitutional and statutory provisions are observed according to those rules and forms which have been established for the protection of private rights, in such a way that it operates on all alike. With those principles in mind, we now turn to the standard of proof a criminal defendant in Oklahoma must bear to prove his incompetence.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type

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[2] Appellant does not raise a lack of notice in connection with any of these proceedings; accordingly, we do not discuss this requirement of Due Process.

of adjudication." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). The *Addington* Court further observed the standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

It seems clear the "preponderance-of-the-evidence" standard is generally used in civil proceedings, *e.g.*, matters involving monetary disputes, etc., because society has a minimal concern with the outcome of such private suits. It therefore makes sense that litigants "share the risk of error in roughly equal fashion." *Id.*

But in criminal cases, the interests of the defendant are of such magnitude that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In other words, "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself, by requiring the State to prove the guilt of an accused beyond a reasonable doubt." *Id.*, 441 U.S. at 423-24, 99 S.Ct. at 1807.

At issue here is the intermediate standard, which our Legislature has termed "clear and convincing." In using this standard our Legislature has determined the interests at stake in this area are more substantial than other civil proceedings (which a competency hearing has been determined to be, *see Miller v. State*, 751 P.2d 733, 737-38 (Okl.Cr.1988)).

The standard of proof used "is more than an empty semantic exercise." *Addington*, 441 U.S. at 425, 99 S.Ct. at 1809 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir.1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct.

2091, 32 L.Ed.2d 791 (1972)). By placing a certain standard on a certain party, it gives courts an indication of "the value society places on individual liberty." *Id.*

This Court, in considering what standard should govern in a present competency proceeding, must assess the presumption of competency together with the extent of the defendant's interest in not being tried while incompetent and the State's interest in being assured a defendant is not merely attempting to escape prosecution by feigning incompetence in a field where "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367; *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811-12.

Appellant's case in an excellent example of why our Legislature set the standard of proof so high. His attorneys first informed the trial court they were concerned about his competency because he refused to communicate with them, seeing them as evil forces seeking his death. However, even his own experts admitted the possibility Appellant was malingering. The State's expert, relying on inconsistent answers given to various health care personnel at Eastern State Hospital, Appellant's record, and observations of Appellant himself, concluded Appellant was competent. In the second hearing, held just before trial started, evidence indicated Appellant acted normally in other criminal proceedings and in situations which did not involve the murders. Even his own psychologist admitted one health care professional at Eastern State had labeled him a "world-class, first-class manipulator"; and was of the opinion Appellant both had an affective disorder and was malingering (although he was of the opinion it was the affective disorder, and not the malingering, which prevented Appellant from communicating with his attorneys).

We list these facts here not to determine at this juncture whether Appellant was in fact mentally ill, whether

he was malingering, or both; but to illustrate the inexactness and uncertainty attached to proceedings of this nature, proceedings based on diagnoses which are "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367 (quoting *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811-12). The State has great interest in assuring its citizens a thorough and speedy judicial process, together with the presumption of competency which is historically based on our law. A truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease. Therefore, we find forcing a criminal defendant to prove by clear and convincing evidence he is incompetent is not subject to proscription under the Due Process Clause, because it does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2577, 120 L.Ed.2d at 363 (quoting *Patterson*, 432 U.S. at 202, 97 S.Ct. at 2322-23).

We therefore reject Appellant's first proposition of error.

B.

We now turn to Appellant's third proposition, whether Appellant presented sufficient evidence to show he was incompetent.

Appellant had two competency hearings: one in late December 1990 and early January 1991; and the second at the start of his trial, May 1992. Appellant now complains both rulings were incorrect.

This Court has held there are two questions which must be addressed in determining present competency. First. we look at whether the defendant was able to understand the nature of the charges and proceedings brought against him; and second, whether the defendant

had the ability effectively and rationally to assist in his defense. *Smith v. State*, 819 P.2d 270, 273-74 (Okl.Cr. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 2312, 119 L.Ed.2d 232 (1992). As we discussed above, a defendant is presumed competent, and must prove otherwise by clear and convincing evidence. 22 O.S.Supp. 1985, § 1175.4

The first hearing presents no real problem. At that hearing, Dr. Edith King testified Appellant was clearly incompetent before he was sent to Vinita. She gave as examples Appellant seemed very vague concerning his charge and became agitated when asked about the murder charge; he had difficulty focusing on any subject for very long; he did not appear to know what would happen to him if he were convicted, saying he would probably get to go home. Dr. King opined Appellant displayed a thought disorder, with possible auditory and visual hallucinations. However, she thought he could be treated. She admitted the possibility Appellant was malingering, and testified that he seemed more in touch with reality the day of the hearing. However, she could not say he was competent the day of the hearing. On the other hand, Dr. Jeanne Russell testified she conducted the screening interview with Appellant when he entered Eastern State Hospital. At that time, he denied knowing the charges against him, his birthdate, or what his attorney's role was. She also reviewed his hospital record, talked with the staff, and contacted the Department of Corrections concerning previous mental history. She also observed him herself. She did not think Appellant's answers were consistent with answers given other staff members, who recorded some of his statements in his record. In those records, there were at least four occasions recorded where he expressed an understanding of courtroom procedure, knew what the charges against him were, and was aware of the consequences of a conviction. The records also showed Appellant expressed an interest in a plea of not guilty by reason of insanity, indicating he had

some knowledge of a possible defense. On one occasion, Appellant was reported to have said: "[y]ou're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars." On another occasion, a notation stated Appellant "won't discuss charges with staff. No reservations in talking with peers," and reportedly said "I've got nothing to lose, I've already got two murder raps on me." [3]

Based on this evidence, we do not find error in the trial court's ruling Appellant was competent.

At the second post-examination competency hearing,[4] Appellant's evidence was stronger. Defense counsel presented inmates from Appellant's jail pod who testified as to Appellant's strange behavior; he compulsively and continually cleaned his cell; played with his feces, smearing it on his face; and talked to himself or to thin air. Dr. Philip Murphy agreed with the comment of a nurse at Eastern State who labeled Appellant a "world-class, first-class manipulator"; however, the psychologist also testified Appellant suffered from major affective (*i.e.*, mood) disorder, which was a form of mental illness. The disorder was episodic in form, meaning it would wax and wane on its own, which made treatment difficult; however, it was treatable. And although Appellant was a malingerer, it was the mental illness which kept him from communicating with his counsel. Therefore, Appellant was not competent.

[3] Appellant argues on appeal Dr. Russell was not a credible witness, as she was not on Appellant's psychiatric team at Eastern State and had never had any significant personal contact with him. We find this unpersuasive. *See Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988) (psychiatrists who were responsible for evaluating Appellant almost five years earlier were dead at time case remanded for post-evaluation competency hearing; however, medical records were still intact and a doctor on staff at Eastern State Hospital testified regarding the information in appellant's record. Court did not question ability of later doctor to make analysis based on records alone.)

[4] At trial, Appellant's attorneys argued to the court the hearing held right before trial was not the post-examination competency hearing, but rather the first hearing, at which the court must have a "doubt" as to a defendant's competency before he can order an evaluation. *See* sections 1175.2 and 1175.3 of Title 22. Trial attorneys also argued that because the hearing was the pre-evaluation hearing, the trial court used the wrong standard in determining there was no merit to Appellant's claim. However, on appeal, Appellant seems to have abandoned that argument, instead referring to both the earlier hearing and the hearing immediately before jury selection as "post-examination competency hearings." Appellant's brief-in-chief at 13; *see also* brief at 15. We therefore need not address the question presented at the trial level concerning which hearing was actually held before trial.

The prosecution's evidence consisted of various jailers who had worked in the jail pod in which Appellant was housed. None of them had noticed anything strange about Appellant, such as compulsive cleaning of his cell, smearing feces on his face or talking while no one else was there. They testified Appellant communicates normally with other inmates and seemed to be aware of his surroundings. The prosecution also presented evidence Appellant had filed two *pro se* civil rights complaints in federal court, one in October 1991 and one in January 1992. When responses were served on him in jail, he appeared to read the responses and understand their contents.

The court was not required to give controlling effect to the opinion of the expert, and instead found in accord with the State's lay witnesses. This is permissible. *Moore v. State*, 672 P.2d 1175, 1177 (Okl.Cr.1983). As we said in *Siah v. State*, 837 P.2d 485, 487 (Okl.Cr.1992), "this Court has never imposed a static analysis for the lower court to apply in all post-examination competency hearings, and we decline to do so now." Examining the entire record of the proceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl.Cr.1974) we hold the trial judge did not abuse his discretion in finding Appellant had not met his burden of proving incompetency.

This proposition is without merit.[5]

For his fourth proposition, Appellant alleges the court erred in accepting trial counsel's waiver of his right to have a jury determine competency. On both occasions, the court specifically asked defense counsel if they wanted a jury trial on the issue of competency; on each occasion, they expressly waived it. Defendant acknowledges that; however, he complains they did not consult him before waiving the right, as he claims they must do.

The applicable statute reads in pertinent part:

> B. The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. . . . . If the court deems it necessary, or if the person alleged to be a person requiring treatment, or any relative, friend, or any person with whom he may reside, or at whose house he may be, *shall so demand*, the court shall schedule the hearing on the application as a jury trial to be held within seventy-two (72) hours of the request, ...

22 O.S.Supp.1985, § 1175.4 (emphasis added). This Court has interpreted that provision to mean a defendant

[5] We feel compelled to address an extremely lamentable comment by the trial judge, if only to show no error occurred other than a slip of the tongue. At the same hearing during which defense counsel expressed his opinion Appellant was faking incompetency (but was not positive that was the case), the court agreed the issue could rise again. In response to counsel's cautionary observation Appellant may not be faking and could damage his chances if he acted up in front of the jury, the court stated: "It's a travesty, perhaps. We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done." However, this Court does not look at the record in isolation. During the second competency hearing, the trial court exhibited an overabundance of caution in protecting Appellant's rights. *See* 5-4 Tr. 31-38, 260-272; I Trial Tr. 3-8. In other words, although the court may have made an injudicious comment, his judicious actions belied his words.

is entitled to a jury trial on the issue of competency only if he demands it. *Scott v. State*, 730 P.2d 7 (Okl.Cr. 1986).

Appellant's cases are inapplicable. *Beck v. State*, 626 P.2d 327, 328 (Okl.Cr.1981), concerns itself with section 1162 of Title 22, dealing with sanity, not competency. *Hayes v. State*, 541 P.2d 210, 212 (Okl.Cr.1975) deals with a valid waiver of trial by jury.

Here, Appellant was not speaking to his attorneys. Under the circumstances, they did the best they could, calculating the bench would be kinder to them than a jury would. This proposition is without merit.

III. JURY SELECTION ISSUES

A.

Appellant in his seventh proposition of error complains the prosecutor defined "reasonable doubt" for the jury during voir dire. The record shows during voir dire, the prosecutor asked one prospective juror: "And you can't define it, like we've said, but without telling me what it is, do you think you can come to a conclusion about what that means, what reasonable doubt is, what's reasonable, what's a doubt, all that?"

We find no error, as we find this question did not attempt to define reasonable doubt. *Cf. Diaz v. State*, 728 P.2d 503, 511 (Okl.Cr.1986) (Comment by prosecutor "You have heard all this talk about beyond a reasonable doubt and you heard the Court . . . saying that that is not the same thing as beyond a shadow of a doubt." Did not constitute the prosecutor's "defining" the phrase, nor did the remark create an erroneous impression.); *Wald v. State*, 513 P.2d 330, 333 (Okl.Cr.1973) (Question by prosecutor ". . . does the term 'reasonable doubt' to you in your mind connote to you beyond all doubt whatsoever? In other words the law implies or gives the State of Oklahoma the burden of proving a person charged

with a crime the burden of proving that person guilty beyond a reasonable doubt, but I'm sure all of you have heard the term beyond a shadow of a doubt or beyond all doubt, and what I am asking you, would you hold the State of Oklahoma to a greater degree of proof than the law imposes?" Held, no attempt made by the prosecutor to define the term of reasonable doubt).

Accordingly, this assignment of error is without merit.

B.

In his eighth proposition of error, Appellant contends the trial court improperly excused for cause two panel members based on their answers to questions about the death penalty.

The first juror to which Appellant objects is Florence Fields. She first said she could consider the death penalty in a proper case. She related she had a cousin whose body was found three days after she was abducted and murdered; she had another relative to whom she was not very close who had been stabbed to death by a boyfriend. The abduction and murder occurred approximately five or six months before this trial; the stabbing occurred three or four years before. During questioning by the prosecutor, Ms. Fields then said she did not believe in the death penalty "under no circumstances." Consequently, when asked if she could sentence someone to death, she said she could "not really" do that. At that point, the court stepped back in, reminded her she had said she could do so. When asked to explain her answers, she said "Well, if you consider it all the way around, then I wouldn't. I could consider it, but just to say I would put somebody to death, no." The court, in an attempt to interpret her answer, asked "[y]ou could consider it, but you couldn't put them to death. Is that what you're saying?" to which Ms. Fields responded "yes." Then in response to questioning by defense counsel, she said there were no circumstances where she could give the death penalty. She

then said there might be circumstances where the death penalty was deserved, but "I don't know if I could really do that." She said she would keep an open mind. However, when again asked by the prosecutor, she said she would not ever give the death penalty. At that point, the court excused her for cause.

The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), dispensed with earlier language in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) by holding a party need not prove a juror's bias against the death penalty with "unmistakable clarity," observing this was because "determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Id., 469 U.S. at 424-26, 852-53. We have followed that philosophy. *See, e.g., Robedeaux v. State*, 866 P.2d 417, 424 (Okl.Cr.1993); *Banks v. State*, 701 P.2d 418, 421-422 (Okl.Cr.1985), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

The same thing is true concerning Verna Kolar. She told the court the district attorney's office had prosecuted her brother in a case a few years before; however, she also said her brother admitted the accusations and pled guilty, so she held no grudges. She first said she could base the punishment on the crime and surrounding facts.[6] She then said she could "probably" agree on a verdict imposing death, "but I do not know if I could sleep well that night doing so." The court then observed:

> Well, it's very difficult sometimes for people to sleep for anything, you know. This is one of those times you just have to do what you think is right. You say you probably could. Now we're talking about where the law and the evidence warrant, could you agree on a verdict imposing the death penalty. I'm not trying to make you say one or the other; I'm just asking what you think?
>
> PROSPECTIVE JUROR KOLAR: No, no I could not.
>
> THE COURT: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if, understand the evidence, the facts and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that, regardless of law, the fact and circumstances of the case, you would not inflict the death penalty?
>
> PROSPECTIVE JUROR KOLAR: No sir, I would not.

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[6] When asked if she had any feelings that would prevent or impair her from considering the death penalty, she replied: "I want to say, yes, I do and, no, I don't. There have been instances when I could answer that easily and say, yes, that person is guilty, that person deserves to die. And there have been other instances when I could not say that."

During questioning by defense counsel, Ms. Kolar said she had said in the past one person or another deserved to die, but "that's because I was out there and I could say those things, because I had no effect whatsoever on that person's life, and here, I do. I cannot easily say that about another human being." On further questioning, Ms. Kolar admitted she could "sit here and say I can [impose the death penalty under the proper circumstances], but there's a lot of difference in sitting right here, even, and walking out that door and doing it. I have no idea what I will do there." The court gave Ms. Kolar the night to consider her position, then excused her the next morning without further questioning. Defense counsel did not object.

The same analysis applies to Ms. Kolar as to Ms. Fields. *Wainwright, supra; Robedeaux, supra, Banks, supra.*

This proposition is without merit.

C.

Appellant then complains his constitutional rights were violated by the use of "death qualification" voir dire questions.

We have repeatedly considered this argument, and have repeatedly rejected it. *Boltz v. State*, 806 P.2d 1117, 1123 (Okl.Cr.1991), *cert. denied*, 502 U.S. 846, 112 S.Ct. 143, 116 L.Ed.2d 109 (1991); *Moore v. State*, 761 P.2d 866, 877 (Okl.Cr.1988); *Johns v. State*, 742 P.2d 1142, 1148 (Okl.Cr.1987); *Banks v. State*, 728 P.2d 497, 502 (Okl.Cr.1986); *Hager v. State*, 665 P.2d 319, 322 (Okl.Cr.1983). We do so yet once again. Appellant's ninth proposition of error is without merit.

IV. FIRST-STAGE TRIAL ISSUES

A.

For his fifth proposition, Appellant claims his case must be reversed because the court gave the jury the standard flight instruction, OUJI-CR 806.[7] Appellant did not testify at trial, nor did he offer any explanation for his conduct.

Appellant points out this Court in *Mitchell v. State*, 876 P.2d 682 (Okl.Cr.1994), declared improper a court's giving the flight instruction in cases where the defendant did not explain his departure. The Court reasoned that giving the instructions in a situation such as this one violated a defendant's presumption of innocence, *see* 22 O.S.1981, § 836,[8] as it "assum[ed] the defendant [has] committed the crime." *Mitchell*, 876 P.2d at 684.

[7] It appears the instruction was based on the evidence Appellant ran when first confronted by police, rather than on evidence Appellant left the scene of the murder, although the record could have been clearer on this point. Appellant's counsel admitted as much during oral argument, pointing out the only reference by the prosecutor to flight during his closing argument was in connection with Appellant's attempts to run from police when spotted several days after the murder.

[8] That section, in effect and unchanged since our laws were adopted from the Dakota Laws of 1887, reads: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." In supplemental authority, Appellant has provided us with United States Supreme court cases containing dicta which indicate the presumption of innocence is "axiomatic and elementary." *See e.g., In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We recognize the possibility the presumption of innocence may be so ingrained in our system of justice as to assume Fourteenth Amendment Due Process proportions. However, the law upon which our statutory presumption of innocence is based predates even *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895), the basis for all subsequent Supreme Court pronouncements on the subject. Indeed, it is this statutory presumption, and

The State acknowledges *Mitchell*, but argues it should be applied prospectively only, since it constituted a "clear break from prior law." State's brief at 25.[9] Appellant in his reply brief cited *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), which held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. We must therefore determine whether *Griffith* is applicable in this case. We hold it is not.

Griffith and the retroactivity principle is indeed applicable in all questions concerning federal questions. However, the Supreme Court has never held we must apply the same standard to holdings by this Court dealing with

not any ephemeral Due Process concerns, which provided the basis for *Vuletich v. State*, 735 P.2d 568 (Okl.Cr.1987), quoted by *Mitchell* as authority for the infirmity in language from OUJI-CR 806. It was in *Vuletich* where we said: "[i]t is improper to tell a jury they must determine guilt or innocence. It is the jury's duty to determine whether the State has demonstrated guilt beyond a reasonable doubt. . . . . If the State fails to sustain its burden, the jury must find the defendant not guilty. See 22 O.S.1981, § 836. A determination of innocence is not required." *Id.* at 569.

[9] At oral argument, the State proposed *Mitchell* should be applied to all cases after Appellant's Mitchell himself. We find no authority for that. In cases such as *Fite v. State*, 873 P.2d 293 (Okl.Cr.1993), we declined to apply our ruling to the appellant before us, as to do so would create an "ex post facto"/Due Process violation arising from the new ruling itself. In other situations, the ruling announced also applied to the appellant in that particular case, if it was not a profound break from prior caselaw. *See e.g., People v. Ward*, 206 Mich.App. 38, 520 N.W.2d 363, 366 (1994) (case holding defendant waives complaint of disproportionate sentence by pleading guilty pursuant to a plea bargain applied retroactively to case *sub judice*; result was clearly foreshadowed by other cases). We find no cases—and the State provides none—in which the appellate court made a pronouncement in an appellant's favor, but did not apply that favorable ruling to the appellant before them, who advanced the argument.

issues of state law. To the contrary, the Court has explicitly stated that when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. ——, ——, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74, 88 (1993); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 178, 110 S.Ct. 2323, 2330-31, 110 L.Ed.2d 148 (1990); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932); *see also Lackey v. Scott*, 28 F.3d 486, 491 (5th Cir.1994) (Texas Court of Criminal Appeals decision requiring definition of reasonable doubt not governed by *Griffith*, as "Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so"; citing to *American Trucking*); *McSherry v. Block*, 880 F.2d 1049, 1052-53 & n. 2 (9th Cir.1989), *cert. denied*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Diggs v. Owens*, 833 F.2d 439, 442 (3d Cir. 1987) (holding *Griffith* applied to constitutional rules of criminal procedure; does not require retroactive application of "new procedural decisions not constitutionally grounded"); *Royster v. Fauver*, 775 F.2d 527, 529 (3d Cir. 1985); *Galloway v. Beto*, 421 F.2d 284, 289 (5th Cir.1970), *cert. denied*, 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970) (court not bound by Texas court's pronouncement on double jeopardy, but is bound by Texas court's holding on the relationship of two offenses as it affects an implied acquittal doctrine).

This Court has heretofore made pronouncements which it declared would be applied prospectively only. *See e.g., Perez v. State*, 798 P.2d 639, 640 (Okl.Cr. 1990); *State v. Neal*, 604 P.2d 145, 147 (Okl.Cr.1979); *Walton v. State*, 565, P.2d 716, 718 (Okl.Cr.1977). Appellant, however, responds those rulings were based on federal caselaw which was overruled by *Griffith*.

We recognize this, but find it has no bearing on our analysis. A state court is empowered to use federal law in analyzing questions of state law. We are free to use these federal cases as persuasive authority for the purpose of guidance; however they do not themselves compel the result we have reached. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-77, 77 L.Ed.2d 1201 (1983). We have done so before, and do so here. *See also Rivers v. State*, 889 P.2d 288, 291 (Okl.Cr.1994).

The basic principles of retroactivity in criminal cases before *Griffith* were established in *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), and *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). In summing up those cases, the Court in *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), said:

> "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall, 388 U.S. at 297, 87 S.Ct. at 1970. *See also Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). This is the standard this Court has used previously. *See Edwards v. State*, 591 P.2d 313, 317 (Okl.Cr.1979); *Rutledge v. State*, 527 P.2d 1373, 1375 (Okl.Cr.1974); *Poke v. State*, 515 P.2d 252, 254 (Okl.Cr.1973); *Garrett v. State*, 438 P.2d 945, 948 (Okl.Cr.1968) (ruling correcting deficient instruction to be applied prospectively only). We find these criteria still valid in interpreting our state law questions. *See Griffith*, 479 U.S. at 329-34, 107 S.Ct. at 716-19 (White,

J., with whom Rehnquist, C.J. and O'Connor, J., join, dissenting).[10]

[10] We are not the only state to hold in this fashion. *See People v. Carrera*, 49 Cal.3d 291, 261 Cal.Rptr. 348, 369-71, 777 P.2d 121, 142-48 (1989); *People v. Robinson*, 229 Cal.App.3d 1620, 281 Cal.Rptr. 26, 29 (1991) (defendant convicted, then escaped. In interim, appellate court hands down ruling which would have been favorable to appellant had his appeal been decided earlier. Court refuses to apply retroactively, as to do so would be "inherently offensive to the judicial process."); *Fenelon v. State*, 594 So.2d 292, 295 (Fla.1992) (case banning flight instruction given prospective application only; harmless error analysis conducted); *Green v. State*, 641 So.2d 391, 395 (Fla.1994) (stressing prospectivity); *Taylor v. State*, 630 So.2d 1038, 1042 (Fla.1993), *cert. denied*, —— U.S. ——, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994) (same); *Gray v. State*, 640 So.2d 186, 193-94 (Fla.App.1994) (notes state supreme court moved away from prior caselaw, which would have held *Fenelon* applied retrospectively; cases cited); *Gilliam v. State*, 582 So.2d 610, 612 (Fla.1991) (caselaw requiring sentencing judge in capital case to expressly evaluate in written order each mitigating circumstance to determine whether it is supported by evidence applied prospectively only; prior holdings not fundamental changes, but rather "evolutionary refinements"); *State v. Singletary*, 549 So.2d 996, 999 (Fla.1989) (decision requiring judge to be present during voir dire questioning by attorneys to be applied prospectively only) *Catlett v. State*, 627 So.2d 558, 559 (Fla.App. 1993) (recognizing prospective application of *Singletary*; *People v. Steidl*, 142 Ill.2d 204, 154 Ill.Dec. 616, 633, 568 N.E.2d 837, 854 (1991), *cert. denied*, 502 U.S. 853, 112 S.Ct. 161, 116 L.Ed.2d 125 (1991) (holding in *People v. Gacho*, 122 Ill.2d 221, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988), *cert. denied*, 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252 (1988) requiring new instruction in multiple murders involving mitigating evidence in capital cases was prospective only; *Griffith* not applicable); *Foster v. State*, 639 So.2d 1263, 1298-99 (Miss.1994) (noting prospective application of decision prohibiting use of two specific aggravating circumstances in capital case under common fact pattern); *People v. Sprowal*, 84 N.Y.2d 113, 615 N.Y.S.2d 328, 331-32, 638 N.E.2d 973, 967-77 (1994) (decisions requiring defendant to be present during sidebar conferences between judge and prospective juror to be applied prospectively only, even though absence in some instances could have a "substantial effect" on the ability to defend against the charges); *People v. Garcia*, 161 Misc.2d 1, 612 N.Y.S.2d 552, 555-56 (N.Y.A.D.1994) (recognizing *Griffith*, but using *Linkletter* factors to determine retroactivity of state issue); *Geesa v. State*, 820 S.W.2d 154, 163-65 (Tex.Crim.App.1991) (holding dealing with definition of reasonable doubt prospective only, as it does not change the standard of proof of reasonable doubt; *Griffith* not applicable); *Barnes v. State*, 876 S.W.2d 316, 328 (Tex.Crim.App.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 174, 130 L.Ed.2d 110 (1994) (following *Geesa*); *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 912 n. 9 (Utah 1993); *Hurn v. State*, 872 P.2d 189, 198-99 (Alaska App.1994) (decision placing duty on trial judge to make record of a defendant's decision not to testify to be applied prospectively; using factors enunciated in *Linkletter* and *Stovall*); *State v. Adams*, 156 Ariz. 88, 750 P.2d 31, 32 (Ariz.Ct.App.1987); *State v. Ottwell*, 852 S.W.2d 370, 372 (Mo.Ct.App.1993) (State supreme court decision holding instruction on intoxication violated Due Process to be applied prospectively, except in cases where complaint was preserved at trial by appropriate objection).

Having established the criteria this Court uses to determine whether a holding of state law should be retroactive, we now turn to the case *sub judice*.

Concerning (b) the extent of the reliance by law enforcement authorities on the old standards, there can be little debate OUJI-CR 806 "would have been given in the proper situation by every court in this jurisdiction based on caselaw that existed before *Mitchell*." *Rivers*, 889 P.2d at 292. The *Mitchell* Court itself noted use of the instruction had caused "confusion" in the past. *Id.*, 876 P.2d at 685. And this Court has approved of its use in prior cases similar to Appellant's, regardless of whether an explanation was given. *See Id.*, 876 P.2d at 686-87 (Lumpkin, P.J., which whom Lane, J., joins, dissenting), and cases cited therein.

Concerning (c) the effect on the administration of justice of a retroactive application of the new standards and (a) the purpose to be served by the new standards, requiring only a prospective application places Appellant "in the same situation as those on post-conviction, eliminating the inherent inequality that results between appellants whose appeals are separated only by time." *Rivers*, 889 P.2d at 292. It also eliminates the inherent unfair-

ness which a clear break with prior existing caselaw can place on the court below, who gave the instruction in good faith. *Id.*

We therefore hold *Mitchell* does not automatically apply retroactively, *see Rivers*, 889 P.2d at 292, and it does not apply in this case.

There is another, equally compelling, reason *Mitchell* does not apply here. This Court in *Mitchell* made it clear whether reversible error occurred would be determined by the particular facts of each case. *See Id.*, 876 P.2d at 685 ("*Based on the facts in this case*, it was reversible error to give instructions on flight" (emphasis added)). This fact-specific dictate is also reflected in *Kentucky v. Whorton*, 441 U.S. 786, 788-89, 99 S.Ct. 2088, 2089-90, 60 L.Ed.2d 640 (1979). There, a state district court failed to give an instruction on the presumption of innocence. The Kentucky Supreme Court reversed, feeling such an instruction was mandated by *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). The United States Supreme Court disagreed, stating the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Rather, "such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." *Whorton*, 441 U.S. at 789, 99 S.Ct. at 2090. *See also Hyatt v. State*, 779 P.2d 993, 995 (Okl. Cr.1989) (following *Whorton*).

The facts of this case do not require reversal. As noted above, it seems clear the flight instruction was given here not based on Appellant's flight from the *crime*, but from his flight from *police* several days after the crime. The evidence showed when Appellant was apprehended after the chase, he was carrying a device commonly used to

smoke crack cocaine. He was arrested for possession of drug paraphernalia based on this charge.

Therefore, *Mitchell* is not applicable here, as it does not "assume the defendant to have committed the crime" for which he was on trial. *Mitchell*, 876 P.2d at 684. If anything, the instruction was improperly given, not because of flight to avoid arrest on a murder charge, but because it would tend to show he committed the crime of possession of drug paraphernalia, a crime with which he was not charged. *See Compton v. State*, 74 Okl.Cr. 48, 53, 122 P.2d 819, 821 (1942) (flight signifies not merely leaving, but leaving under a consciousness of guilt and for the purpose of evading arrest). Accordingly, we find any error in giving the flight instruction was harmless, as the misdirection of the jury has not "resulted in a miscarriage of justice," or has not constituted "a substantial violation of a constitutional or statutory right." 20 O.S. 1991, § 3001.1.

Consequently, we find Appellant's fifth proposition to be without merit.

B.

At trial, Appellant's attorneys submitted the following handwritten instruction defining reasonable doubt.

> "You are instructed that the term proof beyond a reasonable doubt means evidence which creates a moral certainty as to the guilt of the defendant. If the evidence does not amount to a moral certainty in your mind you must find the defendant not guilty."

The instruction was refused. For his sixth proposition, Appellant claims the court erred in refusing the instruction.

We disagree. This Court has a long history of holding it is error to give an instruction defining reasonable doubt, whether it is requested by the defendant, *see Grant v. State*, 703 P.2d 943, 946 (Okl.Cr.1985), *Spitznas v.*

State, 666 P.2d 1307, 1307-08 (Okl.Cr.1983), *Templer v. State*, 494 P.2d 667, 671-72 (Okl.Cr.1972) *Mott v. State*, 94 Okla.Crim. 145, 156, 232 P.2d 166, 177 (1951); or given by the court, *see Fellows v. State*, 508 P.2d 1089, 1090-91 (Okl.Cr.1973), *Young v. State*, 373 P.2d 273, 277-79 (Okl.Cr.1962), *cert. denied*, 371 U.S. 957, 83 S.Ct. 513, 9 L.Ed.2d 504 (1963); *Brookshire v. State*, 284 P.2d 752, 754-55 (Okl.Cr.1955), *Lippoldt v. State*, 271 P.2d 745, 749 (Okl.Cr.1954), *Wallace v. State*, 96 Okl.Cr. 163, 164-65, 250 P.2d 484, 485-86 (1952). This is so because to give such an instruction tends to confuse the jury.

Specifically, we have addressed the "moral certainty" language requested by appellant's trial counsel. In doing so, we stated:

> Fourthly, the defendant complains of error in trial court by a refusal to allow the defense counsel to use the term 'moral certainty' as synonymous with 'beyond a reasonable doubt'. . . .
>
> The defendant goes on . . . to urge that the court committed error in refusing to allow the defendant an instruction on the terms 'moral certainty' and 'beyond a reasonable doubt.' Defendant cites as his only authority . . . the case of *Gray v. State*, 56 Okl.Cr. 208, 38 P.2d 967 (1934), wherein the Court held that while the terms 'moral certainty' and 'beyond a reasonable doubt' are synonymous in some dictionaries, the difficulty is that the words 'moral certainty' add nothing to the words 'beyond a reasonable doubt,' as one may require explanation as much as the other. We also observe that *Gray*, supra, as well as a number of more recent cases, holds that it is not necessary for the trial court to define what is meant by a 'reasonable doubt,' and trial courts have been repeatedly admonished against giving any instruction attempting to define the term 'reasonable doubt.'

> In more recent years, trial courts have been severely criticized by this Court for attempting to define the term 'reasonable doubt.' See *Bell v. State*, Okl.Cr., 381 P.2d 167 (1963); and, it has even been held reversible error to so define this difficulty-of-definition term. *Wilson v. State*, Okl. Cr., 403 P.2d 262 (1965); *Lee v. State*, Okl.Cr., 430 P.2d 858 (1967).
>
> We reiterate the phrase 'reasonable doubt' is self-explanatory, and definitions thereof do not clarify its meaning, but rather tend to confuse a jury; therefore, instructions defining it are unnecessary, and should not be given. The same logic should apply in attempts in voir dire examinations to explain to the jury what is meant by 'reasonable doubt.'

Templer, 494 P.2d at 671-72. *See also Victor v. Nebraska*, 511 U.S. ——, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

Accordingly, Appellant's sixth proposition is without merit.

C.

In his tenth proposition, Appellant alleges the court erred in allowing into evidence a color photograph of Mr. Sheppard taken at the scene. The photograph showed the position of the body after it had been rolled off its side. It displayed characteristics of a body which had been left unattended for four days. During the second stage, the prosecution introduced photographs of Mrs. Warner as she was found half-nude in her residence. Other photographs depicted the injury caused by the ramming of the knife-sharpening tool into her neck.

We have carefully reviewed the photographs and do not find them unduly gruesome. As we recently said in *McCormick v. State*, 845 P.2d 896, 898 (Okl.Cr.1993), "[g]ruesome crimes result in gruesome photographs." We find no abuse of the trial court's discretion in admitting the photographs. Accordingly, this proposition is without merit.

V. COMPETENCY OF COUNSEL

Appellant next argues his counsel was incompetent. He bases this allegation on two grounds. The first is his attorney's sharing his beliefs with the court Appellant was "faking" incompetence. The second portion relates to his incompetence to stand trial; he essentially argues his counsel was incompetent in his representation because Appellant himself was incompetent, and therefore could not communicate with counsel.

The second portion of Appellant's arguments hinges on the trial court's determination he was competent. If Appellant was competent and merely malingering, any lack of communication with counsel was solely Appellant's fault; if Appellant were incompetent, this case would be reversed on that basis. Therefore, we will reserve the second portion of Appellant's argument until we reach the threshold matter of Appellant's competency.

Concerning the first portion of the proposition, the record shows counsel filed an application for determination of competency in August 1990. At that time, Appellant was examined by a psychologist who recommended he be sent to Eastern State Hospital at Vinita for examination, which the District Court ordered. Upon completion of his treatment, Appellant was returned to Oklahoma County, where his counsel waived determination by jury. A post-examination competency hearing presented to the bench was held, and at the conclusion of the hearing Appellant was adjudged competent. During that hearing, defense counsel presented the same psychologist who had examined Appellant before he went to Vinita. He claims on appeal counsel was ineffective for failing to get a new psychologist, someone who could base impressions on an interview with Appellant after his return from Vinita instead of relying almost exclusively on data obtained before he left.

We first address the claim counsel was somehow incompetent because he was candid with the court in sharing

his belief Appellant was "faking" competency. This did not occur during either the first competency hearing or even during the second one; rather, counsel made his comment at the end of another hearing discussing other motions which occurred after the first competency hearing. Counsel felt the need to make a record on his client's uncooperative and threatening attitude. Counsel also quickly followed up his personal belief with the statement he was not a doctor, and others in his office felt Appellant was incompetent; therefore, he felt obliged to raise the issue again. After the court reminded counsel of the results of the first competency hearing, counsel observed incompetency could happen at any time, then essentially let the matter drop at that time.

However, immediately before the start of jury selection proceedings, the same counsel recanted his earlier statements, telling the court his client was incompetent and requested another hearing.

In short, counsel had not made his statements at the first hearing. After the first hearing and before the second one, counsel as an officer of the court candidly expressed his impressions, as he had a duty to do. *Model Rules of Professional Conduct* Rule 3.3(a)(2),[11] 5 O.S.Supp. 1988, Ch. 1, App. 3-A. By the time of trial and the second hearing, counsel recanted his statements. Appellant has cited us no authority—and we know of none—declaring an attorney incompetent as a matter of constitutional law because that attorney may harbor doubts as to his client's sincerity in a criminal proceeding.

Concerning counsel's failure to obtain another expert for the post-examination competency hearing, we find no error. Evaluating the entire record of competency pro-

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[11] That rule reads:

(a) a lawyer shall not knowingly:

. . . .

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid a criminal or fraudulent act by the client.

ceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl. Cr.1974),[12] selection of another expert would not have changed the outcome of the proceedings. The record was virtually brimming with evidence Appellant was malingering (that evidence is discussed in II.B., above).

Absent evidence to the contrary, and examining counsel's performance during both hearings, we cannot declare that Appellant has rebutted the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Camron v. State*, 829 P.2d 47, 56 (Okl.Cr.1992) (citing *Strickland v. Washington*, 466 U.S. 668, 694-96, 104 S.Ct. 2052, 2068-69, 80 L.Ed.2d 674 (1984); or that but for his conduct, there was a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 829 P.2d at 56; *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070.

In light of the discussion contained in Appellant's third proposition, it follows Appellant's counsel was not incompetent because he could not communicate with Appellant either in preparing for or during trial. As we have previously observed, "[a]lthough appellant was a difficult client to repreesnt, he was not an incompetent one." *Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988). The decision not to communicate with counsel was Appellant's alone; whatever reasons he may have had for not communicating, it was not because he was unable to do so.

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[12] There, we said:

> It is not sufficient for the defense counsel merely to say that he is unable to communicate with his client; and, that his client's mental processes seem to waver while he is discussing the case with him; and, that his client does not understand the seriousness of a charge, to constitute justification for a finding that the defendant is mentally incompetent. In considering this question it is necessary that we consider the entire record.

VI. SECOND-STAGE TRIAL ISSUES

A.

Appellant next contends the court committed error by failing to instruct the jury it had the option to return a life senence regardless of its findings of aggravating circumstances.

We have rejected this argument previously. *Williamson v. State*, 812 P.2d 384, 410 (Okl.Cr.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992). We do so again.

This eleventh proposition is without merit.

B.

Appellant next contends the court erred in failing to instruct the jury it could consider sympathy for the accused in assessing punishment.

We have addressed this issue before and have continually found it to be lacking. *Stout v. State*, 817 P.2d 737, 740 (1991). We do so again.

This twelfth proposition of error is without merit.

C.

Appellant in his thirteenth proposition of error contends the court erred in not instructing the jury its findings concerning mitigating circumstances did not have to be unanimous.

This, too, has been considered and rejected by this Court. *Mayes v. State*, 887 P.2d 1288, (Okl.Cr.1994).

Accordingly, this proposition of error is without merit.

D.

For his fourteenth proposition of error, Appellant asserts the court erred in giving instructions which permitted jurors to ignore mitigating evidence.

We have rejected this argument as well. *Williamson*, 812 P.2d at 409. We do so again.

This proposition is without merit.

E.

In his fifteenth proposition of error Appellant claims the instruction defining "heinous, atrocious or cruel" is unconstitutional because it does not adequately channel the jury's discretion.

We addressed this argument in *Nuckols v. State*, 805 P.2d 672, 674 (Okl.Cr.1991), *cert. denied*, 500 U.S. 960, 111 S.Ct. 2276, 114 L.Ed.2d 727 (1991). We see no need to address it again. *See also Walton v. Arizona*, 497 U.S. 639, 654-55, 110 S.Ct. 3047, 3057-58, 111 L.Ed.2d 511, 529 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *United States v. Pretlow*, 779 F.Supp. 758, 773 (D.N.J. 1991); *United States v. Cooper*, 754 F.Supp. 617, 623 (N.D.Ill.1990); *Nguyen v. State*, 769 P.2d 167, 174 (Okl.Cr.1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989).

We find no merit to this proposition.

F.

For his sixteenth proposition, appellant contends there was insufficient evidence to sustain the aggravating circumstance he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

The existence of this aggravating circumstance is determined by looking at the killer's intent. *Romano v. State*, 847 P.2d 368, 387 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994); *Williamson v. State*, 812 P.2d 384, 407 (Okl.Cr.1991), *cert. denied* —— U.S. ——, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992); *Stouffer v. State*, 738 P.2d 1349, 1361-1362 (Okl.Cir.1987), *cert. denied*, —— U.S. ——, 112 S.Ct. 1573, 118 L.Ed.2d 217 (1992); *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987), *cert. denied*, 502 U.S. 913, 112 S.Ct. 313, 116 L.Ed.2d 255 (1991). In the absence of his own statements of intent, such evidence may be inferred from circumstantial evidence. *Banks v. State*, 701 P.2d 418, 426 (Okl.Cr.1985); *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

Evidence during the second stage indicated Appellant had been convicted of robbing two men whom he had allowed to live. Those men gave a description of Appellant and the vehicle that ultimately allowed Appellant to be captured and imprisoned. This was true even though the victims did not know Appellant. This would tend to show a reluctance to allow another victim to live, even though he did not know the victim. The evidence also showed Appellant pulled down the shades during the burglary of Mr. Sheppard's house and wiped down what was probably the murder weapon. Both these acts tend to show Appellant did not want to be detected or identified by anyone. In the light most favorable to the prosecution, this evidence would tend to show Appellant murdered Mr. Sheppard so he would not be detected or arrested as a result of his burglary. *See Parks v. State*, 651 P.2d 686, 695 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003.

Appellant also contends this Court has applied the "avoiding arrest" aggravating circumstance, codified at 21 O.S. § 701.12(5),[13] in a standardless, *ad hoc* fashion, rendering it unconstitutionally vague. However, Appellant has not supported his contentions with relevant argument and citations of authority, instead making vague refer-

[13] That statute reads in pertinent part:

Aggravating circumstances shall be:

. . . .

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

ences to other aggravating circumstances he claims are also unconstitutionally vague. Therefore, we will not address it. *Munson v. State*, 758 P.2d 324, 335 (Okl.Cr. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809. We note in passing the Oklahoma death penalty statutes have previously been held to be constitutional. *See Jones v. State*, 660 P.2d 634, 643 (Okl.Cr. 1983).

Accordingly, this proposition is without merit.

G.

In his seventeenth proposition of error, Appellant claims the trial court erroneously allowed evidence of unadjudicated crimes and bad acts to be submitted to the jury. He points with particularity the evidence he murdered Mrs. Warner. He claims this violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The evidence in question was used in support of the aggravating circumstance a probability existed Appellant would commit criminal acts of violence that would constitute a continuing threat to society. There is no requirement of a prosecution resulting in a conviction for this continuing threat aggravator to be applied. 21 O.S.1981, § 701.12(7). Indeed, this Court has held that unadjudicated acts can be used to prove the defendant is a continuing threat to society. *Walker v. State*, 723 P.2d 273, 285 (Okl.Cr.1986), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 600 (1986); *Johnson v. State*, 665 P.2d 815, 822-23 (Okl.Cr.1982). The reason for this was explained in *Johnson*, where this Court quoted from *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to the effect that a jury can consider several things to determine whether a defendant should receive the death penalty, adding:

> This Court also finds persuasive the language used by the Model Penal Code. Section 210.6 of the Model Penal Code provides in part:
>
> > In the proceeding, [sentencing] evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in . . . this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, . . ., provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> Therefore, it is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage. Prior criminal activity is relevant to the jury determination on the aggravating circumstance the defendant would constitute a continuing threat to society. It is "essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, *supra*. The evidence of the Lawrence killing was properly admitted.

Johnson, 665 P.2d at 822-23. Here, Appellant was given ample opportunity to rebut the unadjudicated acts against Mrs. Warner, which he did in an exemplary manner. We find the evidence tested under the fire of cross-examination to be reliable. Accordingly, Appellant's proposition is without merit.

H.

For his eighteenth proposition, Appellant alleges the "continuing threat" aggravating circumstances is vague and overbroad. We have repeatedly rejected that argument. *See Malone v. State*, 876 P.2d 707, 7715-16 (Okl.Cr.1994) and cases cited therein; *Snow v. State*, 876 P.2d 291, 298 (Okl.Cr.1994).

This proposition is without merit.

I.

As a follow-up proposition, Appellant contends the jury relied upon the unconstitutional aggravating circumstances of heinous, atrocious or cruel; continuing threat; and avoiding arrest or prosecution in arriving at its decision. As we have found none of the aggravators constitutionally infirm, this nineteenth proposition is without merit.

J.

In his twentieth proposition, Appellant contends the death penalty procedure is unconstitutional, as it allows the prosecutor to have unbridled discretion in determining when to seek the death penalty.

We considered this identical argument in *Romano v. State*, 847 P.2d 368, 392-93 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), and rejected it there. We do so again.

K.

In his twenty-first proposition of error, Appellant states the trial court allowed an improper application of the aggravating circumstance the murder was commited by a person while serving a sentence of imprisonment on conviction of a felony, 21 O.S.1981, § 701.12(6). A brief discussion is required here.

Evidence at trial showed Appellant had been sentenced to the penitentiary for two convictions of robbery

with a firearm in Oklahoma County case CFR-80-3020. He was incarcerated January 19, 1981. After being released, he committed second degree burglary and was placed back in the penitentiary system on July 20, 1987. Appellant was admitted to the Pre-Parole Conditional Supervision (PPCS) program and the procedure was explained to him on June 27, 1989.

The evidence also established that under the PPCS program, if an inmate does not agree to abide by certain rules and conditions, he can be returned to prison. For the first month or so, Appellant did well on the program; however, he missed an office visit in August and had some curfew violations. The first part of September, Appellant's probation officer had decided to classify Appellant as a program failure and send him back to a lockdown unit; however, she was unable to do so because of a bed shortage in prisons. Mr. Sheppard was killed September 4; Mrs. Warner was killed September 16. During this time, Appellant was still in PPCS.

Appellant acknowledges he was on the PPCS program, but argues the aggravator the jury found does not apply to those in his situation.

> The statute reads in pertinent part: Aggravating circumstances shall be:
>
> . . . .
>
> (6) The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

Appellant argues the statute is only applicable to those inside the prison walls; therefore, he was not actually "serving" a term of imprisonment at a Department of Corrections institution at the time of the killing.

We have not addressed this particular aspect of this aggravator before. However, we have held those who are in the PPCS program are still incarcerated. *See Barnett v. Moon*, 852 P.2d 161, 162 (Okl.Cr.1993) (". . . *pre* parole is by definition not parole, but a prepa-

ratory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, logically *pre* parole means *before* such release."); *Harper v. Young*, 852 P.2d 164, 165 (Okl.Cr.1993) ("As set forth in *Barnett*, the question concerning the PPCS program is not whether an inmate is in custody, because he is; but the degree of confinement used in that custody. The degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified."). We have held in other areas an inmate need not actually be confined within prison walls to be considered imprisoned. *Hunt v. State*, 793 P.2d 1366, 1368 (Okl.Cr.1990) (defendant outside prison walls on limited pass can be convicted of "escape"); *McCoy v. State*, 536 P.2d 1309, 1312 (Okl.Cr.1975) (inmate who escapes from hospital can be convicted of escape). *See also Urbauer v. State*, 744 P.2d 1274, 1275 (Okl.Cr.1987) ("for purposes of escape from a penal institution, 'custody' may be restraint by either physical means or a superior force acting as a moral restraint.") Given these earlier cases indicating one need not be behind bars to be "imprisoned," and the fact the conditions of PPCS were explained to him when he was released from a correctional facility, Appellant cannot claim he did not have notice his status was the same.

Clearly, Appellant was "imprisoned" as the term is commonly defined. It seems obvious the Legislature enacted this aggravator in order to protect persons who, even though they may be incarcerated, are still members of society. It makes little sense to hold the aggravator can be used to protect one segment of society, while not protecting an even greater segment of that same society.[14]

[14] The Alabama Court of Criminal Appeals was faced with a similar situation in *Whisenhant v. State*, 555 So.2d 219 (Ala.Cr.App. 1984), *aff'd*, 555 So.2d 235 (Ala.1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990). There, a defendant committed a murder while on parole. The court held that was sufficient to satisfy the aggravating circumstance the murder was committed while "under sentence of imprisonment." *Id.*, 555 So.2d at 229, 231.

Therefore, this proposition is without merit.

L.

For his twenty-second and last proposition of error, Appellant claims as unconstitutional the statutory requirement a jury list aggravating circumstances as specific findings of fact before the death penalty can be imposed. He claims this runs afoul of the constitutional prohibition against special verdicts found in Okla. Const. art. 7, § 15.[15]

We have previously addressed that contention in *Romano v. State*, 847 P.2d 368, 384-85 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). We see no need to address it again.

VII. MANDATORY SENTENCE REVIEW

This Court is required by 21 O.S. 1991, § 701.13(C) to determine whether (1) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of aggravating circumstances as enumerated in 21 O.S. 1981, § 701.12. Pursuant to this mandate, we shall first determine whether the evidence was sufficient to support the imposition of the death penalty.

The prosecution alleged five aggravating circumstances: Appellant was previously convicted of a felony

[15] That section reads:

> In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.

involving the use or threat of violence to the person (21 O.S.1981, § 701.12(1)); the murder was especially heinous, atrocious, or cruel (21 O.S.1981, § 701.12(4)); the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution (21 O.S.1981, § 701.12(5)); the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony (21 O.S.1981, § 701.12(6)); there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (21 O.S.1981, § 701.12(7)).

The jury found the existence of all five. We have addressed the sufficiency of the evidence supporting murder during imprisonment; and the evidence supporting the aggravator he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

To show prior violent felonies, the prosecution presented witnesses who had been victims of a robbery and car theft committed by appellant in 1980. The witnesses were getting in a vehicle outside a supermarket in Oklahoma City when Appellant approached them, pointed a pistol at them and angrily threatened to blow their heads off if they did not give him their money and the car keys. Another witness testified Appellant became friendly with her to the point she began to feel uncomfortable around him and would not answer her door when he would attempt to visit her. One night when she arrived at her Bethany apartment she saw movement in her apartment before she entered. She notified police, who chased down and arrested Appellant. Appellant had rifled through her belongings; and was carrying an electrical cord he had ripped from an appliance in the apartment. The cord was approximately five and one-half to six feet long; and the clear implication was Appellant intended to use the cord in some manner against the woman who occupied the apartment. Evidence showed Appellant was convicted of two counts of robbery relating to the supermarket holdup, and one count of second degree burglary relating to entering the woman's apartment in Bethany.

This evidence is sufficient to support the aggravating circumstance Appellant was previously convicted of a felony involving the use or threat of violence to the person.

Also supported by the evidence is the aggravating circumstance there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Sheppard was killed on or about September 4, 1989. On September 17, the brutalized body of Monteen Warner was found inside her home at 1021 N.E. 6th, a few blocks from Mr. Sheppard's home. A television set was missing from the home. Ms. Warner was naked from the waist down, a plastic bag over her head. A nylon rope or belt was found underneath her. Also found under the body was a wooden mallet broken in two. A sharpening steel, bent at the handle with traces of human blood on it, was also found; the object was apparently hammered into the victim's throat. In addition, numerous bruises were found on her body. An autopsy revealed she had been choked with enough force to break a bone in the neck, Cause of death was suffocation. Evidence both at the scene and from other witnesses connected Appellant to this crime. The evidence also indicated Appellant had performed some yard work for Ms. Warner, and was unhappy about how much he was paid.

Other evidence showed Appellant seriously beat a fellow inmate in the county jail in June 1990. Witness heard Appellant tell the inmate, David Schnelle, he was going to kill him. Schnelle had to be hospitalized; he required surgery to remove a broken bone from his retina, an eye was knocked out of its socket, and a cheek bone was broken in the beating. No explanation was given for the beating; but Appellant became angry at Schnelle sev-

eral days before during a card game, and had threatened to beat him.

In February 1992 during a search of Appellant's cell, authorities found a homemade ice pick consisting of three metal rods (originally reinforcement rods in the concrete around the jail windows) sharpened at one end and tied together with torn sheets.

This evidence more than supports the aggravating factor that there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The remaining aggravating circumstance is the murder was especially heinous, atrocious, or cruel. The 86-year-old Mr. Sheppard was stabbed in the abdomen; there were three stab wounds on the left side of the victim's neck; there were cuts on his hand. The characteristics of the wounds indicated they may have been made by someone behind the victim; who reached around and stabbed him in the front. The cuts on the hand indicated the victim struggled to fend off the knife. The knife wound to the abdomen was two and one-eighth inches wide, and extended at least four and one-half inches into the body, damaging the large intestine, small intestine, the liver, and the diaphragm. The medical examiner testified death was not immediate; the victim could have lived as long as 30 minutes or more. The crime scene revealed blood all over the bedroom, including large puddles on a dresser, as if the victim had doubled over the dresser at some point. He was not found in front of the dresser. Presence of the blood throughout the bedroom indicates the victim did not immediately lose consciousness after being stabbed repeatedly; rather, he moved around the room before falling between the bed and the wall.

In the light most favorable to the prosecution, this evidence supports the jury's finding the murder was especially heinous, atrocious or cruel. It showed the victim suffered serious physical abuse while still conscious.

In contrast to this evidence in support of aggravation, Appellant presented the following mitigating circumstances: he was abandoned by his father by age 3; by age 4 he was begging on the streets; his developmental history was slowed by a poor home life; an adverse psychological impact of being told his parents had been killed when they had not been; the only father figure in his life was killed by his mother while he was still relatively young; his growth years were marred by a mother with alcohol problems who physically abused him by beating him with extension cords, sticks, bats and other items; his mother's rejection of him after he was released from a delinquent boys' home; adverse influences and condition at the boys' home; he had been institutionalized for approximately 12 years of his first 18 years of life; he was sexually abused while in prison; he was addicted to drugs at an early age, and was addicted at the time of the homicide.

Reviewing the evidence in mitigation and aggravation, we find the sentence of death to be factually substantiated and appropriate. We find no indication the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

VIII. CONCLUSION

Finding no error warranting reversal or modification, the judgment and sentence for Murder in the First Degree is AFFIRMED.

JOHNSON, V.P.J., and LANE and STRUBHAR, JJ., concur.

CHAPEL, J., concurs in results.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

(Title Omitted in Printing)

**ORDER DENYING REHEARING
AND DIRECTING ISSUANCE OF MANDATE**

Petitioner has filed a Petition requesting this Court grant rehearing and stay the mandate in *Cooper v. State*, —— P.2d ——, 66 OBJ 166 (Okl.Cr. 1-10-95). In it, Appellant alleges two reasons why rehearing should be granted: this Court erred in ruling the presumption of innocence is a state, and not federal constitutional right; and this Court erred in ruling a mental health professional could give an opinion based on inadequate medical records.

We find Petitioner is not entitled to a rehearing as he has failed to show that our opinion in this case conflicts with current case law or an express statute; and he has not presented this Court with some question decisive of the case that has been submitted by the attorney of record and overlooked by this Court. Those are the sole grounds upon which rehearing can be based. *See* 22 O.S.Supp.1994, Ch. 18, App. *Rules of the Court of Criminal Appeals*, Rule 3.14(B)(1) & (2).

This Motion for Rehearing is DENIED. The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13th day of February, 1995.

/s/ Charles A. Johnson
CHARLES A. JOHNSON
Presiding Judge

Not Participating
CHARLES S. CHAPEL
Vice-Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN
Judge

/s/ James F. Lane
JAMES F. LANE
Judge

/s/ Reta M. Strubhar
RETA M. STRUBHAR
Judge

SUPREME COURT OF THE UNITED STATES

No. 95-5207

BYRON KEITH COOPER,
Petitioner

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 16, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 15, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 3, 1996. Rule 29.2 does not apply.

October 5, 1995